No. 14-1146

Title:	Tyson Foods, Inc., Petitioner v. Peg Bouaphakeo, et al., Individually and on Behalf of All Others Similarly Situated
Docketed:	March 20, 2015
Linked with 14A816	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(12-3753)
Decision Date:	August 25, 2014
Rehearing Denied:	November 19, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Jan 26 2015	Application (14A816) to extend the time to file a petition for a writ of certiorari from February 17, 2015 to March 19, 2015, submitted to Justice Alito.
Jan 29 2015	Application (14A816) granted by Justice Alito extending the time to file until March 19, 2015.
Mar 19 2015	Petition for a writ of certiorari filed. (Response due April 20, 2015)
Mar 24 2015	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from cousel for the petitioner
Mar 24 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Apr 13 2015	Order extending time to file response to petition to and including April 27, 2015.
Apr 14 2015	Consent to the filing of amicus curiae briefs, in support of either party or of niether party, received from counsel for the petitioner.
Apr 20 2015	Brief amicus curiae of The National Chicken Council filed.
Apr 20 2015	Brief amicus curiae of Equal Employment Advisory Council filed.
Apr 20 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Apr 20 2015	Brief amicus curiae of U.S. Poultry & Egg Association filed.
Apr 20 2015	Brief amicus curiae of Washington Legal Foundation filed.
Apr 20 2015	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
Apr 20 2015	Brief amici curiae of National Association of Manufacturers, et al. filed.
Apr 27 2015	Brief of respondents Peg Bouaphakeo, et al., Individually and on Behalf of All Others Similarly Situated in opposition filed.
May 11 2015	Reply of petitioner Tyson Foods, Inc. filed. (Distributed)
May 12 2015	DISTRIBUTED for Conference of May 28, 2015.
May 26 2015	DISTRIBUTED for Conference of May 28, 2015.
Jun 1 2015	DISTRIBUTED for Conference of June 4, 2015.
Jun 8 2015	Petition GRANTED.

Jun 12 2015	Consent to the filing of amicus curiae briefs, in support of either party or of niether party, received from counsel for the petitioner.
Jun 23 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 7, 2015.
Jun 23 2015	The time to file respondents' brief on the merits is extended to and including September 22, 2015.
Jul 13 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 7 2015	Joint appendix filed. (Statement of costs filed.)
Aug 7 2015	Brief of petitioner Tyson Foods, Inc. filed.
Aug 14 2015	Brief amici curiae of Civil Procedure Scholars in support of neither party filed.
Aug 14 2015	Brief amicus curiae of Equal Employment Advisory Council filed.
Aug 14 2015	Brief amicus curiae of Association of American Railroads filed.
Aug 14 2015	Brief amicus curiae of Consumer Data Industry Association filed.
Aug 14 2015	Brief amicus curiae of Wal-Mart Stores, Inc. filed.
Aug 14 2015	Brief amicus curiae of Dow Chemical Company filed.
Aug 14 2015	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Aug 14 2015	Brief amicus curiae of Trans Union LLC filed.
Aug 14 2015	Brief amicus curiae of Washington Legal Foundation filed.
Aug 14 2015	Brief amicus curiae of Cato Institute filed.
Aug 14 2015	Brief amici curiae of Atlantic Legal Foundation and The International Association of Defense Counsel filed.
Aug 14 2015	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Aug 14 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Aug 14 2015	Brief amici curiae of National Association of Manufacturers, et al. filed.
Aug 14 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Sep 9 2015	SET FOR ARGUMENT on Tuesday, November 10, 2015
Sep 10 2015	Record requested from the U.S.C.A. 8th Circuit.
Sep 21 2015	Record received from U.S.C.A. 8th Circuit. (1 Box)
Sep 22 2015	Brief of respondents Peg Bouaphakeo, et al., Individually and on Behalf of All Others Similarly Situated filed.
Sep 28 2015	Brief amicus curiae of Public Justice, P.C. filed. (Distributed)
Sep 29 2015	CIRCULATED
Sep 29 2015	Brief amicus curiae of the United States filed. (Distributed)
Sep 29 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 29 2015	Brief amici curiae of Civil Procedure Professors filed. (Distributed)
Sep 29 2015	Brief amicus curiae of American Independent Business Alliance filed. (Distributed)
Sep 29 2015	Brief amicus curiae of American Association for Justice filed. (Distributed)
Sep 29 2015	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Sep 29 2015	Brief amici curiae of Economists and Other Social Scientists filed. (Distributed)
Sep 29 2015	Brief amici curiae of AARP, et al. filed. (Distributed)
Sep 29 2015	Brief amicus curiae of Braun and Hummel filed. (Distributed)
Sep 29 2015	Brief amici curiae of Impact Fund, et al. filed. (Distributed)
Sep 29 2015	Brief amici curiae of Complex Litigation Law Professors filed. (Distributed)
Sep 29 2015	Brief amicus curiae of United Food and Commercial Workers International Union filed.

	(Distributed)
Sep 29 2015	Brief amici curiae of Urethanes Plaintiffs filed. (Distributed)
Sep 29 2015	Brief amici curiae of Illinois, et al. filed. (Distributed)
Sep 29 2015	Brief amici curiae of Professors Alexandra D. Lahav & Sachin S. Pandya filed. (Distributed)
Oct 9 2015	Record received from U.S D.C. Northern Dist. of Iowa, the record is electronic and SEALED.
Oct 19 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 21 2015	Reply of petitioner Tyson Foods, Inc. filed. (Distributed)
Nov 10 2015	Argued. For petitioner: Carter G. Phillips, Washington, D. C. For respondents: David C. Frederick, Washington, D. C.; and Elizabeth Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED
MAR 19 2015
OFFICE OF THE CLERK

14-1146

No. 14-

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 19, 2015

QUESTIONS PRESENTED

I. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

PARTIES TO THE PROCEEDINGS

The petitioner is Tyson Foods, Inc. ("Tyson"), and respondents are Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, who filed suit on behalf of themselves and other similarly situated individuals at Tyson's pork-processing plant in Storm Lake, Iowa.

RULE 26.9 STATEMENT

Tyson has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Tyson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 765 F.3d 791 and reproduced at Pet. App. 1a–24a. The Eighth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 114a–131a. The district court's unpublished orders denying Tyson's motion to decertify the class and Tyson's post-trial motion are reproduced at Pet. App. 25a–30a and 31a–38a. The district court's opinion granting class certification and conditional certification of a collective action is reported at 564 F. Supp. 2d 870 and is reproduced at Pet. App. 41a–113a.

JURISDICTION

The court of appeals entered judgment on August 25, 2014, Pet. App. 1a, and denied rehearing on November 19, 2014, Pet. App. 114a. On January 29, 2015, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3) and the Fair Labor Standards Act ("FLSA") provisions that authorize a private cause of action for damages for unpaid overtime compensation, 29 U.S.C. §§ 207(a), 216(b), which are reproduced at Pet. App. 132a–136a.

INTRODUCTION

In this case, a deeply divided Eighth Circuit sanctioned the use of seriously flawed procedures that many district courts have used to permit certification and adjudication of class actions under Rule 23(b)(3) and collective actions under the FLSA. Plaintiffs are hourly workers at a pork-processing facility who alleged that they are entitled to overtime compensation and liquidated damages because Tyson failed to compensate them fully for time spent "donning" and "doffing" personal protective equipment and walking to and from their work stations. The district court certified the class based on the existence of common questions about whether these activities were compensable "work," even though there were differences in the amount of time individual employees actually spent on these activities and hundreds of employees worked no overtime at all. The court then allowed plaintiffs to ignore these individual differences and "prove" liability and damages to the class with "common" statistical evidence that erroneously presumed that *all* class members are identical to a fictional "average" employee. The end result of this "undifferentiated presentation[] of evidence" was a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Pet. App. 24a (Beam, J. dissenting).

The Eighth Circuit's affirmance of that unjust result warrants review because it exacerbates two circuit splits and conflicts with this Court's decisions in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), and *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013). *Wal-Mart* and *Comcast* should have put a stop to class certification premised on the notion that

classwide liability and damages can be established through a "Trial by Formula," *Wal-Mart*, 131 S. Ct. at 2561, and damages models that ignore the basis of the defendant's putative liability to each class member, *Comcast*, 133 S. Ct. at 1433. That lax approach to class certification effectively evades Rule 23's predominance requirement and alters substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2702.

The Second, Fourth, Fifth, Seventh, and Ninth Circuits have properly held that no class may be certified where plaintiffs seek to obtain an aggregate damages award for the class by extrapolating from a fictional "average" class member. Nevertheless, plaintiffs in other circuits continue to obtain class certification on the premise that they can "prove" the defendant's liability and damages for the class by extrapolating from an unrepresentative sample. In addition to the Eighth Circuit decision below, the Tenth Circuit recently affirmed class certification where plaintiffs obtained an aggregate damages award by extrapolating from a sample of class members who had varying degrees of injuries (and in many cases no injuries at all). This Court's review is thus warranted to clear up the confusion and put an end to this violation of the Rules Enabling Act and the Due Process Clause.

This Court's review is also needed to resolve the confusion among the lower courts on the question whether a class may be certified when it includes uninjured class members. The Second and Ninth Circuits have held that all class members must have standing to sue, and the D.C. Circuit recently held that to obtain class certification, plaintiffs must be able to show injury to all class members. The Third, Seventh, and Tenth Circuits, in contrast, have held

that the requirements of Article III are satisfied as long as a single class member was injured and has standing to sue. Like the Eighth Circuit here, those courts allow plaintiffs to use Rule 23(b)(3) to bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages.

Rule 23(b)(3) does not expand the jurisdiction of federal courts or authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were harmed. This Court should grant review to resolve the confusion and put an end to this unlawful practice.

STATEMENT OF THE CASE

1. Plaintiffs are current and former hourly employees at Tyson's Storm Lake, Iowa, pork-processing plant. Apdx.00684. These line employees worked in two areas: on the Slaughter (or "Kill") floor and on the Processing (or "Fabrication") floor. *Id.*

The Storm Lake facility employs approximately 1,300 employees, doing over 420 distinct jobs over two shifts. Apdx.00684; Appellees' Apdx.00149–172. Each position requires the job-holder to perform certain duties and to wear different sanitary items and personal protective equipment ("PPE"). Apdx.00684–85; Apdx.00827–00851.

All employees wear a hard hat, hairnet, and ear protection while on the production floor, Apdx.00685, but the similarities end there. Processing employees wear a frock, like a butcher's smock, while Slaughter employees wear a company-issued white shirt-and-pants uniform, *id.*, or their own comparable clothing, Tr. 263–64.

Additional items worn by employees depend on the employee's job, Apdx.00685, and personal preference, Tr. 156–57, 329, 498, 504, 511. Knife-wielding employees in both areas don and doff, in varying combination, plastic belly guards, mesh sleeves, plexiglass arm guards, Polar gloves, Polar sleeves, scabbards (or sheaths) for their knives, and steels with which to maintain them. Apdx.00684.[1] Some non-knife users, in contrast, choose to wear rubber gloves, cotton gloves, or plastic aprons. Apdx.00685, Tr. 156–57, 266–69, 444, 607, 651, 654. Further, employees in both departments regularly elect to wear other Tyson-provided items as a matter of personal preference. See Tr. 157, 244, 260, 607, 651, 654. Thus, even employees working the same job may be attired quite differently. Tr. 259–60, 266–68, 271, 747–48.

2. This case is brought by employees paid on Tyson's "gang-time" system, which compensates them from the time the first piece of product passes their work stations until the last piece of product does so. Tr. 178. Tyson also pays a fixed amount of extra time each day called "K-Code time" (because it is given to employees in departments using knives), Pet. App. 2a, that compensates employees for donning/doffing-related activities.

From the beginning of the limitations periods until February 2007, Tyson paid four minutes of K-Code time per day to each employee who worked in a department in which a knife was used.[2] Apdx.00686;

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[1] Approximately 70 percent of the class were knife-wielding employees. Tr. 325.

[2] The Slaughter and Processing floors were mainly comprised of such departments; thus, most class members who worked during this time period would have received four minutes per

Tr. 1358. From February 2007 to June 28, 2010, Tyson paid only knife-wielding employees K-Code time of four to eight minutes (depending on their specific job for the shift). Apdx.00686.

In addition, some class members were compensated for these donning/doffing and walking activities even apart from any K-Code payments they received. Specifically, employees who were assigned to come in early to setup or stay late to teardown after gang time were paid for the additional time, Tr. 547, and were able to don/doff and clean their gear and walk to/from the work station during that period of time, Tr. 1457; Apdx.00108; Apdx.00136; Apdx.00139; Apdx.00236.

3. Plaintiffs filed this action in 2007 for themselves and other "similarly situated individuals," alleging that Tyson failed to compensate its employees for overtime work, in violation of the FLSA, 29 U.S.C. § 207, and the Iowa Wage Payment Collection Law, Iowa Code § 91A.1, *et seq.*, which provides a state-law basis to recover for FLSA claims. Apdx.00001–00002; Apdx.00013–00014. Plaintiffs did not challenge the gang-time system. They claimed, however, that the K-Code times were too low, and they were entitled to overtime compensation for unpaid time spent on donning/doffing, washing, and walking when those activities were undertaken by an employee who worked more than 40 hours in a workweek. Apdx.00009–00012.

Plaintiffs moved for the certification of a Rule 23(b)(3) class and an FLSA collective action. Apdx.00017; Apdx.00040. Tyson objected, arguing that liability and damages could be determined only

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day they were on the job, regardless of whether they actually worked a knife job. Apdx.00686; Tr. 390.

on an individual basis, Apdx.00065; Apdx.00461. The district court agreed that "there [we]re some very big factual differences among hourly employees at Tyson" given that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet. App. 87a. Nevertheless, because the court viewed "the gang time compensation system" as a "'tie that binds'" the class together under a single, common question of law, it certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members who are also members of the Rule 23 class. Pet. App 87a, 110–11a; Apdx.00684.

4. After this Court decided *Wal-Mart Stores, Inc.* v. *Dukes*, Tyson filed a motion to decertify the Rule 23 class. Dkt. 212. Tyson asserted that decertification was necessary because plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution ... in one stroke." Dkt. 212-1, at 5 (quoting *Wal-Mart*, 131 S. Ct at 2551).

Plaintiffs opposed decertification, asserting, first, that they could prove Tyson undercompensated the class members with a time study by Dr. Kenneth Mericle that purported to show the average amount of time Tyson employees spent on donning/doffing-related activities. Dkt. 223-1, at 22. Specifically, Mericle identified eight donning/doffing-related "activities" on the Processing side and six on the Slaughter side. Apdx.00802–00803; Apdx.1084–85. He then measured how much time a small sample of employees took for each of these activities in both areas. Tr. 1350. Finally, he computed the average time for the donning/doffing-related activities he identified, added an estimated walking time, and calculated an "all-in" average of 18 minutes on the

Processing floor and 21.25 minutes on the Slaughter floor. Apdx.0082–0083.

Second, plaintiffs said they would calculate entitlement to overtime compensation and damages with a report by Dr. Liesl Fox. Fox assumed that *all* class members spent Mericle's averaged amount of time donning/doffing their equipment—*i.e.*, that everyone on the Processing floor spent 18 minutes and everyone on the Slaughter floor spent 21.25 minutes on donning/doffing-related activities. Then, using a computer program and Tyson's pay records, she determined how much overtime compensation an employee would be due, if any, if he or she were credited for Mericle's averaged donning/doffing time each workday during the class period. Dkt. 226, Ex. 3, at 2. Finally, Fox totaled those numbers to arrive at an aggregate damages award for each class.

Tyson objected that this purported proof would result in a "trial by formula" expressly prohibited by a unanimous Court in *Wal-Mart*. Dkt. 212-1, at 10–12. Whether an employee was entitled to overtime pay, Tyson argued, could be determined only on an individualized basis because the employees donned/doffed different equipment in a different order over different amounts of time while working different jobs. Dkt. 237, at 11. To determine Tyson's liability and damages based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated the company's right to demonstrate that *individual* class members were not entitled to overtime. *Id.* at 5.

The district court denied Tyson's motion, finding that whether "donning and doffing and/or sanitizing of the PPE ... constitutes 'work'" was a common question susceptible to common proof. Pet. App. 37a. The court observed, without elaboration, that there

were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id.*

5. At trial, however, the few class members who testified admitted that Tyson required employees to wear different PPE, depending on their job, and that employees chose to wear different items, depending on their personal preferences. Tr. 611 (Lovan); Tr. 634 (Balderas); Tr. 705–06 (Brown). Additionally, these employees testified that they don and doff these pieces of equipment in a different order, in different places, and that each piece requires a distinct amount of time. Tr. 604, 628.

Nevertheless, plaintiffs purported to prove class members' entitlement to overtime compensation with Dr. Mericle's testimony regarding his averaged time study. Mericle conceded that his time measurements necessarily included employees who performed different jobs and donned and doffed different equipment. Tr. 897, 899, 1049, 1141. This resulted in "a lot of variation." Tr. 1158. For instance, when Mericle measured the pre-shift donning of equipment by Processing floor employees in the locker room, his observed times ranged from approximately half a minute to ten minutes. Pet. App. 137a. On the Slaughter side, he similarly observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift. *Id.* at 138a.

Mericle also conceded that this wide disparity—which repeated itself with each "activity" measured—was because "some of [the workers] put on more equipment than others." Tr. 1144. On the Processing floor, for example, Tyson required the employee in one position to wear one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one Plexiglass arm guard. Tr. 504–05. In contrast, the employee in another position (also on the same

Processing floor) had to wear only one mesh apron, one scabbard, one steel sharpener, one mesh glove, one Polar sleeve, and one mesh sleeve, Tr. 507, while a third employee in a different position on that floor needed to don none of these pieces, *id.*

Mericle's recorded measurements also showed that Tyson's employees did not don their equipment in the same place or in the same order. Tr. 897, 907. In fact, Mericle measured employees continuing to don equipment once they were on the disassembly line (and, thus, already on paid gang-time), yet he included them in his computations. Tr. 1003. Nor did Mericle account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or teardown responsibilities. Tr. 1457.

By his own admission, Mericle did not pre-select workers from a variety of jobs, Tr. 1105–08, or ensure that his sample had the same proportion of knife and non-knife wielding employees as Tyson's workforce, Tr. 1050. Instead, he and his team observed whichever employees were performing a certain activity at a given time, allowing the employees to self-select into his study. Tr. 912. As a result, he agreed that he did not study a "random sample." Tr. 913.

Dr. Fox testified that classwide damages were $6,686,082.36 for the Rule 23 class and $1,611,702.44 for the FLSA collective if one assumed that every class member worked Mericle's "average" times. Tr. 1277–78; Apdx.00869. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, sanitizing, and walking. Tr. 1307.

Fox also acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included over 212 members who suffered no injury at all; even adding the estimated time did not result in those employees working over 40 hours in a single week. She further explained that, as Mericle's average donning/doffing times are reduced, the number of uninjured workers would increase as more employees' work hours fell below 40 for a given week. Tr. 1351. This drop-off happens in a non-linear fashion, *id.*, so her calculations were "all or nothing," meaning that "if the jury concludes the activities take [a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result" without re-running the program, Tr. 1352.

At the close of plaintiffs' case, Tyson asked the court to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. Tr. 1398–1401; Dkt. 270. The district court denied the motion, trial continued, and the case was submitted to the jury.

6. The jury found that the class members were "entitled to additional compensation for ... the donning and doffing activities at issue in this case," and awarded damages in the amount of $2,892,378.70, substantially less than Fox had calculated for the Rule 23 class. Tr. 1819.

After the verdict, Tyson requested judgment as a matter of law and renewed its motion for decertification of the class. The undisputed trial testimony showed that the class contained employees from numerous departments, "all of which were comprised of many different positions, all requiring different combinations of required and optional safety

or sanitary items." Dkt. 304-1, at 9. These individual differences and Mericle's failure to account for them in his study, Tyson contended, meant that Mericle's averaged times did not establish whether any given employee was actually undercompensated. *Id.* at 10. Moreover, Fox's testimony established that there are at least 212 class members who had zero uncompensated overtime, and the actual number of uninjured employees was much higher. Because the jury awarded a damages figure less than Fox calculated, it necessarily found that Mericle's average times were overstated and, as Fox conceded at trial, the number of uninjured class members rises if one assumes that the amount of time spent on donning/doffing, cleaning, and walking activities is less than Mericle calculated. *Id.* at 13 (citing Tr. 1302). Nonetheless, these uninjured plaintiffs were included in the aggregate damages award, now making it impossible to award damages accurately after the jury rejected Fox's "all or nothing" damages total. *Id.* at 13–14.

The district court denied Tyson's motion, saying that "there [was] not a complete absence of probative facts to support the [jury's] conclusion, nor did a miscarriage of justice occur." Pet. App. at 30a.

7. On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that "individual plaintiffs varied in their donning and doffing routines," Pet. App. 8a, and that plaintiffs "rel[ied] on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated "work" time, *id.* at 11a. The majority reasoned, however, that because "Tyson had a specific company policy" and the "class members worked at the same plant and used similar equipment," "this inference [was] allowable under *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680, 687 ... (1946)." *Id.* at 8a. In the majority's view, plaintiffs' application of Mericle's averaged donning/doffing times to individual "employee time records to establish individual damages" meant that "[t]hey [had] prove[d] liability for the class as a whole." *Id.* at 10a.

The majority also rejected Tyson's argument that decertification was necessary "because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." Pet. App. 8a. The majority said "Tyson exaggerate[d] the [legal] authority for its contention," but provided no further analysis or explanation. *Id.* at 9a.

Judge Beam dissented. He emphasized the myriad differences between the class members, "differences in [their] donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation [and] other relevant factors." *Id.* at 23a (Beam, J., dissenting). "While ... all class members were subject to a common policy—gang-time payment," there could be "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because Tyson, by issuing K-Code time, had already paid for donning/doffing in many instances and because the amount of time individual employees spent donning and doffing varied. *Id.* Thus, the common evidence could not "resolve[] [the case] in 'one stroke,'" *id.* (quoting *Wal-Mart*, 131 S. Ct. at 2551), and the class "should have been decertified," *id.*

In addition, Judge Beam found that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees. Pet. App. 22a. As he noted, "the

jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* Consequently, by certifying a class with hundreds of uninjured employees the district court would force Tyson to pay employees whom it had fully compensated, a result that would be unfair to Tyson and any class members who actually were injured. *Id.*

8. Tyson's petition for rehearing or rehearing *en banc* was denied by a vote of 6 to 5. In an opinion respecting the denial of rehearing, Judge Benton stated his view that "*Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context" and that the plaintiffs implicitly satisfied this standard by proffering expert testimony of classwide average donning/doffing times. Pet. App. 127a–128a & n.5 (Benton, J., respecting the denial of rehr'g en banc). He also concluded that "Tyson has no interest in how the fund is allocated among class members," so it is not relevant to the appeal that hundreds of uninjured employees were included in the class. *Id.* at 131a.

Again, Judge Beam dissented, decrying the court's affirmance of "a professionally assembled class action lurching out of control." *Id.* at 115a (Beam, J., dissenting from rehr'g denial). First, Judge Beam faulted the majority for misreading *Mt. Clemens*, which allows the use of a "just and reasonable inference" in determining damages, but *only after* plaintiffs carry the "individual burden of [proving] by a preponderance of the evidence" that "each putative class member" "performed work for which he was not properly compensated." *Id.* at 120a (internal quotation marks omitted). Applying that inference at

the liability stage by using an average donning/doffing time, Judge Beam argued, relieved plaintiffs of their burden and resulted in awarding damages to hundreds of uninjured plaintiffs. *Id.* at 120a–121a.

Second, Judge Beam emphasized that the inclusion of these uninjured employees in the class—when paired with the jury's reduced aggregate damages award—underscored the inappropriateness of certifying the class in the first instance. By awarding a reduced damages award, the jury necessarily found Mericle's time estimations inflated. As a result, "well more than one-half the certified class of 3,344 persons have no damages whatsoever and the balance have markedly lower damages that are now virtually impossible to calculate." Pet. App. 125a. By upholding the district court's class certification, the entire class—including the hundreds of members with "no provable damages"—were made "joint beneficiaries" of the "lump sum district court judgment" but without a means to limit distributions for only proven damages. *Id.*

REASONS FOR GRANTING THE PETITION

I. WHETHER CLASS OR COLLECTIVE ACTIONS MAY BE CERTIFIED BASED ON STATISTICS THAT ERRONEOUSLY PRESUME ALL CLASS MEMBERS ARE IDENTICAL TO AN AVERAGE OBSERVED IN A SAMPLE IS AN IMPORTANT AND RECURRING QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS.

This case presents this Court with the opportunity to address the propriety of certifying a class under Rule 23(b)(3), or an FLSA collective action, where plaintiffs' common "proof" of liability and damages is

statistical evidence that erroneously presumes that all class members are identical to the average observed in a sample. Notwithstanding this Court's guidance in *Wal-Mart* and *Comcast*, this recurring issue has sharply divided the lower courts.

The undisputed evidence in this case showed that there was substantial variance in the amount of time individual employees spent in donning/doffing-related activities each day. The three production workers who testified at trial and gave time estimates, explained that each wore different items and spent different amounts of time on donning/doffing-related activities. See Tr. 708–09 (more than 2 minutes for Brown to don gear pre-shift); Tr. 598 (6–7 minutes for Lovan); Tr. 641 (10–12 minutes for Balderas); see also Tr. 1157 (Mericle conceding that in his time study, there were "different [times] for every single person [his] team measured").

Calling each of the remaining 3,341 members of the class to testify would have been impracticable. It also would have demonstrated that the district court was clearly wrong in thinking Tyson's liability for damages was "capable of classwide resolution" and could be resolved "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. So plaintiffs presented evidence that purportedly would permit the jury to determine liability and damages for all class members: Mericle's time study. In upholding class certification, the Eighth Circuit panel majority allowed plaintiffs to "prove" liability and damages based on Mericle's averaged times, and held that the variations among individual plaintiffs did not "prevent [a] 'one stroke' determination" of liability and damages. Pet. App. 8a.

That erroneous decision is in direct conflict with the Seventh Circuit's decision in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Plaintiffs in

Espenscheid were satellite dish technicians who claimed that they were required "to do work for which they were not compensated at all, and also to work more than 40 hours a week without being paid overtime for the additional hours" in violation of the FLSA and parallel provisions of state law. *Id.* at 773. The Seventh Circuit assumed, for purposes of appeal, that "plaintiffs could prove that [the employer's] policies violated the [law] in these ways." *Id.* But even so, the court held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776.

In so holding, the Seventh Circuit expressly rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class." *Id.* at 774. In that case (as here, see *supra* p. 10), there was "no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members." 705 F.3d at 774. But even if by "pure happenstance" the number of unpaid hours worked each week by the employees in the sample "was equal to the average number of hours of the entire class," the sampling "would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held,

> would require that all have done roughly the same amount of work.... No one thinks there was such uniformity. And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of

> overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) under-compensate him by half.

Id.

That reasoning is equally applicable here. Plaintiffs' time study confirmed that there was wide variation in the amount of time employees spent donning and doffing different combinations of PPE. For example, employees spent between 0.583 minutes and 13.283 minutes donning equipment in the locker room pre-shift, and between 1.783 minutes and 9.267 minutes doffing and storing equipment post-shift. See Pet. App. 137a–138a. But even this understates the individual variation among class members. The undisputed record evidence shows that some employees had time to don protective gear at their station after the production line had commenced operation—and thus were paid for that activity under Tyson's gang-time system. See *supra* p. 16. Some employees were paid to come in before or after gang time to set up or clean up the production line, and when they did so, they donned and doffed their PPE during the set up or clean up time for which they were paid. See *supra* pp. 6, 10. Thus, had this case been brought in the Seventh Circuit, class certification would have been denied because plaintiffs could prove entitlement to overtime and damages only by using a time study based on impermissible averaging.

The Eighth Circuit did not explain how its decision was consistent with *Espenscheid*. Although it acknowledged that the Seventh Circuit held that class certification was "improper" when there were variations in the class and "use of an average

conferred a 'windfall' on some class members," the panel majority dismissed the decision with a simple "cf." citation with no explanation. Pet. App. 9a. Instead, it said that to apply the time study to "individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 ... (1946)." Pet. App. 8a. That is simply incorrect.

Mt. Clemens requires a plaintiff seeking unpaid overtime under the FLSA to prove "that *he* performed work for which *he* was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687 (emphasis added). As the Seventh Circuit recognized, nothing in that decision allows an employee who was fully compensated by the K-Code time he received to recover damages by showing that K-Code time was not sufficient to compensate another employee, much less a fictional composite employee. See *Espenscheid*, 705 F.3d at 775 ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

Class certification also would have been denied had this case been brought in the Fourth Circuit, which, like the Seventh Circuit, does not permit class certification where aggregate damages will be based "on abstract analysis of 'averages.'" *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). *Broussard* was brought by franchisees who sought lost profits allegedly caused by the franchisor's misuse of advertising funds. To prove damages, plaintiffs called an expert who computed "an average profit margin based on a sample of franchisees' financial data" and "an

estimate of 'on average how many additional cars would have come in per week in the typical Meineke dealer's shop had the additional advertising dollars been spent.'" *Id.* This focus on a "fictional" "'typical franchisee operation,'" the court held, was improper where the actual "profits lost by franchisees" differed "according to their individual business circumstances." *Id.* That this invalid "shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.*

The Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), similarly held that a class cannot be certified based "on an estimate of the average loss for each plaintiff." *Id.* at 231. "[S]uch an aggregate determination," the Second Circuit explained, would likely result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *Id.* It also poses the "danger of overcompensation" in that some members of the class may benefit from the recovery even though they were not injured. *Id.* at 232. "This kind of disconnect offends the Rules Enabling Act, which provides that the federal rules of procedure, such as Rule 23, cannot be used to 'abridge, enlarge, or modify any substantive right.'" *Id.* at 231 (quoting 28 U.S.C. § 2072(b)).

The Fifth Circuit, too, has recognized that class certification based on such procedures results in an impermissible "alteration of substantive" rights. See *In re Fibreboard*, 893 F.2d 706, 712 (5th Cir. 1990). Plaintiffs in *Fibreboard* were individuals suffering diseases allegedly caused by exposure to asbestos. The district court certified a class based on a trial

plan under which liability and damages would be determined for approximately 3,000 class members by "index[ing]" them to 41 test cases. *Id.* at 711. The Fifth Circuit reversed, holding the class "cannot be certified" on this basis because it "create[d] the requisite commonality for trial" by "submerge[ing]" the "discrete components of the class members' claims and the asbestos manufacturers' defenses." *Id.* at 712; see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311–29 (5th Cir. 1998) (finding plan to establish classwide liability on damages based on extrapolation violates defendants' Seventh Amendment right to a jury trial).

The Ninth Circuit in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), likewise realized that it would alter rights and violate due process to allow classwide damages to be determined through "sampling" when there is substantial variance among individual class members. *Id.* at 1168. *Jimenez* was a wage-and-hour class action brought by claims adjusters who alleged that Allstate had an unofficial policy requiring them to work unpaid off-the-clock overtime. The district court certified a class to decide whether such a policy existed, but bifurcated the proceedings and "rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase." *Id.* "This split," the Ninth Circuit held, preserved "Allstate's due process right to present individualized defenses to damages claims." *Id.*[3]

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[3] Allstate has filed a petition for writ of certiorari seeking review of this decision on the grounds that Rule 23 and the Due Process Clause do not allow plaintiffs to establish classwide *liability* through statistical "sampling" just as they do not allow plaintiffs to use sampling to prove classwide *damages*. *See Allstate Ins. Co.* v. *Jimenez*, 83 U.S.L.W. 3638 (Jan. 27, 2015)

In contrast, neither the district court nor the Eighth Circuit took any steps to preserve Tyson's right to present defenses to individual claims. They refused to decertify the class notwithstanding the existence of undisputed differences in donning and doffing times. And they allowed plaintiffs to "prove" damages with a formula that applied average donning/doffing times to all class members.

That the Eighth Circuit would allow such a procedure is particularly surprising because it is so at odds with this Court's recent decisions in *Wal-Mart* and *Comcast*. *Comcast* made clear that "courts must conduct a rigorous analysis" of expert models "purporting to serve as evidence of damages in [a] class action," and they must deny class certification where the models employ flawed methodologies or produce "arbitrary measurements." 133 S. Ct. at 1433 (quotations omitted). To ignore defects in the model and allow class certification as long as there is "*any*" damages model, "no matter how arbitrary," would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* (emphasis in original).

And *Wal-Mart* makes clear that a damages model based on averaging is a flawed approach that cannot be used to avoid individualized inquiries and permit liability and damages to be determined on a classwide basis. In *Wal-Mart*, this Court unanimously reversed class certification where liability and damages would be determined for a sample, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class,

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(No. 14-910). Here, the Eighth Circuit upheld the district court's class certification with regard to both liability *and* damages. Thus, if this Court were to grant certiorari and reverse in *Jimenez*, that would *a fortiori* require vacatur of the Eighth Circuit's decision here.

and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561. Such a "Trial by Formula," this Court held, would impermissibly abridge the defendant's rights under the Due Process Clause and the Rules Enabling Act. *Id.*

Here, as in *Wal-Mart*, allowing classwide liability and damages to be established on the basis of statistical sampling precluded Tyson from raising its "defenses to individual claims." *Id.*; see also *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."). In this class trial, Tyson lost the right to show the jury that individual class members had no unpaid overtime. In an individual trial, Tyson could have cross-examined the employee and sought to prove that the employee spent (or reasonably could have spent) less time engaged in donning/doffing-related activities than was claimed. Or Tyson could have shown that the employee was compensated for such activities by the K-Code payments or because he performed them at times in which he was compensated (*i.e.*, when that employee's "gang time" had started or when Tyson paid the employee to setup or clean up the production area). In a class trial, however, Tyson was reduced to attacking the methodology used by plaintiffs' experts to determine the "average" donning/doffing time.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a; see also *id.* at 13a. That plaintiffs' expert added the average donning/doffing times to the class members' actual time records does not change the fact that classwide liability was based purely on extrapolation and an assumption—*i.e.*, that each class member spent the same "average" amount of time donning, doffing and walking—rather than individualized proof as to how, if at all, each was injured.

Unfortunately, the Eighth Circuit is not alone in its refusal to follow *Wal-Mart*. The Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), affirmed class certification in an antitrust case where plaintiffs "proved" damages with an expert who applied average overcharges to disparate transactions, including transactions for which there were no overcharges. *Id.* at 1257. The Tenth Circuit thought that was an appropriate way to "approximate" damages in a large class action, saying "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate damages."[4] *Id.*

This Court should grant review to resolve the conflicts among the courts of appeals and put an end to the practice of using averaging and extrapolation from a sample to mask individual differences so that

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[4] The Dow Chemical Company filed a petition for writ of certiorari on March 9, 2014, seeking review of this issue. *Dow Chemical Co.* v. *Seegott Holdings, Inc.*, No. 14-1091. Thus, if this Court were to grant certiorari and reverse in *Dow*, that would require vacatur of the Eighth Circuit's decision here.

vast numbers of disparate individual liability and damages claims can be aggregated together in a large class action. Rule 23 is not a license for plaintiffs' counsel to engage in this type of "'claim fusion'" in "which claims in the aggregate merge to assume characteristics that no individual claim possesses." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1003 (2005). Nor does it permit district courts to engage in "'ad hoc lawmaking'" or "the manipulation of substantive rules to assist in resolving or preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law." *Id.* This Court's review is therefore needed to ensure that Rule 23 is "interpreted in keeping with" the Due Process Clause and the Rules Enabling Act, "which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

II. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER A CLASS MAY BE CERTIFIED WHERE THE CLASS INCLUDES MEMBERS WHO WERE NOT INJURED.

Plaintiffs who seek to invoke the jurisdiction of the federal courts have the burden of establishing that they have standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To meet that burden, plaintiffs must show, among other things, that they suffered an "'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Id.* at 560. "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the

resolutions of which have direct consequences on the parties involved." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013).

Although this Court has held that Rule 23 "'must be interpreted in keeping with Article III constraints'" on standing, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem*, 521 U.S. at 613), the lower courts are divided about what that entails. Specifically, the circuit courts disagree about whether plaintiffs must show that all class members were injured by the defendants' allegedly unlawful actions, or whether a class may be certified even though it includes members who were not injured and thus have no claim for damages.

The lead decision allowing certification of classes that include members with no plausible claim to damages is *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009). Although the Seventh Circuit recognized that "injury is a prerequisite to standing," it held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.* at 676.

A divided panel of the First Circuit recently agreed that the "'possibility or indeed inevitability'" that some class members were not injured "'does not preclude class certification.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (quoting *Kohen*, 571 F.3d at 677). The court thus affirmed class certification in an antitrust case in which 2.4% of the class likely had no injury, *id.* at 32, which, as the dissent noted, would be "at least 24,000 people," and

"nobody knows who the 24,000 are," *id.* at 32, n.29, 25 (Kayatta, J., dissenting).[5]

The Tenth Circuit also has cited *Kohen* in holding that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm." *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). And the Tenth Circuit recently affirmed class certification in an antitrust case in which it expressly acknowledged that some class members "avoid[ed] injury altogether." *In re Urethane*, 768 F.3d at 1254.

The Third Circuit reached a similar result in *Krell* v. *Prudential Insurance Company of America*, 148 F.3d 283 (3d Cir. 1998), a case involving allegedly fraudulent sales practices by an insurance company. The district court certified the class despite defendants' objections that it included "both injured and uninjured policyholders." *Id.* at 306. The Third Circuit affirmed, holding that if "the named plaintiffs satisfy Article III," the "absentee class members are not required to make a similar showing." *Id.* at 307.

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[5] To be sure, *Kohen* and its progeny have stated that a district court may decline to certify a class that "contains a great many persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677. But it reached that conclusion not because of the limitations imposed by Article III (or due process or any substantive law), or because the presence of uninjured class members is a warning sign that individualized inquiry is required, but "because of the *in terrorem* character of a class action," which, "by aggregating a large number of claims," can "impose a huge contingent liability upon a defendant." *Id.* at 678. *Nexium* demonstrates this *ad hoc* and standardless test imposes no meaningful constraint on class certification of classes with thousands of uninjured members, even when the district court has no plan for ensuring that they do not contribute to the defendant's liability or share in the judgment.

In contrast, the Second Circuit held in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that "no class may be certified that contains members lacking Article III standing." Rather, the class must "be defined in such a way that anyone within it would have standing." *Id.* at 264. The Ninth Circuit has agreed with this test. See *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney*, 443 F.3d at 264).[6]

More recently, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the D.C. Circuit vacated the district court's certification of a class where plaintiffs could not "prove, through common evidence, that all class members were in fact injured." *Id.* at 252. The district court in *Rail Freight* had not been troubled by the presence of uninjured class members, because it looked to cases like *Kohen* and held that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Id.* at 255 (alterations in original) (quotations omitted). The D.C. Circuit expressly disapproved of that approach, noting that *Kohen* was decided before this Court's decision in *Comcast* when "the case law was far more accommodating to class certification under Rule 23(b)(3)." *Id.* Instead, the court held that if plaintiffs cannot show with "common evidence" that "all class members suffered *some* injury," then class

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[6] As the Fifth Circuit noted in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), *cert. denied sub nom.* 135 S. Ct. 754 (2014), the Seventh, Eighth, and Ninth Circuits have not been entirely consistent on the question, with some decisions adopting the *Kohen* test and others citing *Denney*. *Id.* at 800–01 & nn.27–30. Considering all the decisions, there is a "roughly even split of circuit authority." *Id.* at 801.

certification must be denied because "individual trials" would be necessary "to establish whether a particular [class member] suffered harm." *Id.* at 252.

Thus, if Tyson's plant were located in the Second or D.C. Circuits, the district court could not have certified the class because plaintiffs could not prove, with common evidence, that all class members were injured. Quite the contrary, plaintiffs' damages expert admitted that the class contained at least 212 employees who were not injured because they did not work *any* unpaid overtime even under Mericle's assumed averages. See *supra* p. 11. The actual number of uninjured class members is even larger. As Judge Beam explained in dissent, the fact that the jury awarded plaintiffs less than half the damages they requested indicates that the jury disagreed with plaintiffs' "over-generous time study conclusions." Pet. App. 125a. And plaintiffs' expert admitted that if "'employee[s] worked less than [the time study] numbers ... it is possible that Tyson's K-code payments already have fully paid them for that time.'" *Id.* at 123a (omission in original). Accordingly, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.* at 125a. Yet *all* class members are "included as beneficiaries of the single damages verdict" and, "damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 22a–24a.

To affirm that result, as the Eighth Circuit did, is to allow plaintiffs to use the procedural device of Rule 23(b)(3) to alter substantive law in violation of the Rules Enabling Act. The panel majority had no persuasive argument to the contrary. Its only justification for the inclusion of uninjured class members was to say that *Tyson* "invited" the error by

requesting that the jury be instructed that it could not award damages for "[a]ny employee who has already received full compensation for all activities you find to be compensable." Pet. App. 10a (quotations omitted). That reasoning is flawed and cannot insulate the district court's error from appellate review. As Judge Beam explained, Tyson did not invite the erroneous inclusion of uninjured class members; it "vigorously" opposed class certification "at every turn in this litigation." *Id.* at 20a. But when its objections to class certification were rejected by the district court, Tyson reasonably and properly requested "that the plaintiffs be held to their evidentiary burdens of proof." *Id.*

This Court should therefore grant review to resolve the circuit split and ensure that Rule 23(b)(3), which is a limited procedural device for aggregating liability and damages claims, is not used improperly to expand federal court jurisdiction and compensate individuals who suffered no injury, lack Article III standing, and are entitled to zero damages.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECUR IN BOTH CLASS ACTIONS UNDER RULE 23(B)(3) AND COLLECTIVE ACTIONS UNDER THE FLSA.

As is evident from the circuit court cases discussed above, the question whether a class can be certified where liability and damages will be determined with statistical sampling that erroneously presumes that all class members are identical to the average of a sample, and the question whether a class can be certified that includes members with no injury, are questions that arise in a variety of class actions. Indeed, this Court's own docket confirms that these questions commonly arise in wage-and-hour collective

actions under the FLSA and in Rule 23(b)(3) class actions brought under parallel provisions of state law like the Iowa Wage Payment Collection Law at issue here. See *supra* note 3 (discussing petition for writ of certiorari in *Allstate Ins. Co.* v. *Jimenez*, No. 14-910). They also arise in consumer fraud cases and antitrust actions and a variety of other actions for damages in federal courts. See *supra* note 4 (discussing petition for writ of certiorari in *Dow Chemical Company* v. *Seegott Holdings, Inc.*, No. 14-1091).

The division among the lower courts on these questions warrants this Court's review. Although the questions frequently arise when plaintiffs seek class certification in the district court, they typically escape appellate review. Interlocutory review of a certification decision is rare. See 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 7.2 (10th ed. 2013). And "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

In addition, "professionally assembled class action[s]," Pet. App. 115a (Beam, J., dissenting), are now a fact of life that impose significant costs on companies doing business in the United States. While Rule 23 was intended to "impose[] stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Color Rest.*, 133 S. Ct. 2304, 2310 (2013), certification continues to be the norm. A recent study of major companies found that 54% of them "are currently engaged in class action litigation." *The 2015 Carlton Fields Jorden Burt Class Action Survey* 6 (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-

survey.pdf. "[C]onsumer fraud and labor and employment remain the most prevalent class action matters," accounting for "more than 50 percent of all class actions." *Id.* at 3. Indeed, it is now estimated that "90% of all federal and state court employment law class actions filed in the United States are wage and hour class or collective actions." Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and Precautions Employers Should Take* 1 (2012) *available at* http://www.lb7.uscourts.gov/documents/12-19431.pdf.

Although the drafters of Rule 23 realized that a damages class action could "be convenient and desirable depending upon the particular facts," they emphasized that it should only be used when "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23, advisory committee's 1966 note. When it is necessary for plaintiffs to use sampling techniques to create a fictional plaintiff with "average" characteristics that are applied by extrapolation to class members with strikingly different individual circumstances in order to "prove" defendants' liability or damages to all class members with common evidence, procedural fairness and due process are sacrificed. See *supra* pp. 23–24. When a class includes uninjured members who would have no standing to litigate or obtain damages on their own, procedural fairness and due process are the victims. See *supra* pp. 29–30. This Court should grant review to put an end to these unlawful practices and return Rule 23 to the narrow exception to individual litigation as it was adopted in 1966.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 12–3753.
Submitted: Feb. 11, 2014
Filed: Aug. 25, 2014.

PEG BOUAPHAKEO; JAVIER FRAYRE; JOSE A. GARCIA; MARIO MARTINEZ; JESUS A. MONTES; HERIBENTO RENTERIA, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs–Appellees

v.

TYSON FOODS, INC.,

Defendant–Appellant.

Before SMITH, BEAM, and BENTON, Circuit Judges.

Opinion

BENTON, Circuit Judge.

Peg Bouaphakeo and other named plaintiffs are employees of Tyson Foods, Inc. They represent a class of employees at Tyson's meat-processing facility in Storm Lake, Iowa. They sued Tyson for not paying wages due under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq., and the Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 et seq. A jury returned a verdict for the class. Tyson appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

The employees are current and former "gang-time" employees at Tyson's facility. The background is similar to that in *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 873–75 (8th Cir.2012) (adapted to the facts of this case):

> To calculate the employees' compensable working time, Tyson measures "gang time"—when the employees are at their working stations and the production line is moving. The employees claim Tyson failed to provide FLSA overtime compensation for donning (putting on) personal protective equipment (PPE) and clothing before production and again after lunch, and for doffing (taking off) PPE and clothing before lunch and again after production. The PPE and clothing worn by individual employees vary depending on their role in the process. Tyson classifies items of PPE and clothing as either "unique" or "non-unique" to the meat-processing industry. The employees also seek compensation for transporting the items from lockers to the production floor.
>
> In addition to "gang time," Tyson adds "K-code" time to each employee's paycheck. Before 2007, Tyson paid four minutes of K-code time per day to each [employee in a department where knives were used] in order to compensate for the donning and doffing of unique items. From [February] 2007 to [June] 2010, Tyson added [several minutes] per day for pre-and post-shift walking time required of the employee. Tyson does not record the actual time that employees perform any of these tasks.

* * * *

The FLSA prohibits the employment of any person "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 [126 S.Ct. 514, 163 L.Ed.2d 288] (2005). An employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 [66 S.Ct. 1187, 90 L.Ed. 1515] (1946), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84; *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 881 (8th Cir.2011). "Neither 'work' nor 'workweek' is defined in the statute." *Alvarez*, 546 U.S. at 25 [126 S.Ct. 514]. At one time, the Supreme Court defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 [64 S.Ct. 698, 88 L.Ed. 949] (1944), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84. The Court then "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA." *Alvarez*, 546 U.S. at 25 [126 S.Ct. 514], *citing Armour & Co. v. Wantock*, 323 U.S. 126, 133 [65 S.Ct. 165, 89 L.Ed. 118] (1944).

Whether an employee's activity is "work" does not end the compensability analysis. In the Portal–to–Portal Act, Congress excluded some activities that

might otherwise constitute work from the FLSA. The Act excepts two categories:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a); *Alvarez*, 546 U.S. at 26–28, 126 S.Ct. 514. "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable if those activities are *an integral and indispensable part of the principal activities* for which covered workmen are employed and are not specifically excluded by [29 U.S.C. § 254(a)(1)]." *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (emphasis added). And, "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under [29 U.S.C. § 254(a)]." *Alvarez*, 546 U.S. at 37, 126 S.Ct. 514.

The Department of Labor has a "continuous workday rule," generally defining an employee's "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b); *Alvarez*, 546 U.S. at 29, 37 [126 S.Ct. 514] (describing and applying the continuous workday rule). During the continuous workday, the compensability of all activities that otherwise satisfy the requirements of

the FLSA is not affected by the Portal–to–Portal Act's exceptions. In *Alvarez*, the Supreme Court held that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [the Portal–to–Portal Act], and as a result is covered by the FLSA." *Alvarez*, 546 U.S. at 37 [126 S.Ct. 514].

The employees sued in 2007, claiming that Tyson's K-code time was insufficient to cover compensable pre- and post-production line activities, violating the FLSA and IWPCL. The district court[1] certified the FLSA claim as a collective action and the IWPCL claim as a Rule 23 class action.[2] During a nine-day trial, plaintiffs proved liability and damages by using individual timesheets, along with average donning, doffing, and walking times calculated from 744 employee observations. The jury returned a verdict

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[1] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa. The case was later transferred to the Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

[2] *See Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 884 (N.D.Iowa 2007) (finding, in a similar donning and doffing case, that "there is no novel issue of state law in the IWPCL Claim, nor is there a difference in the terms of proof required by the FLSA Claim and the IWPCL Claim. There are no issues of first impression in the IWPCL Claim that the Iowa courts would be better suited to answer. . . . [T]he substance and basis of the FLSA Claim and the IWPCL Claim is virtually indistinguishable, that is, the claims involve identical facts and highly similar legal theories.") (internal quotations removed). *See generally Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 425 (D.C.Cir.2006) (finding "state law claims essentially replicate the FLSA claims" in an overtime case).

for the class of $2,892,378.70. With liquidated damages, the final judgment totaled $5,785,757.40.

II.

Tyson argues that the district court erred in certifying the FLSA collective action—under 29 U.S.C. § 216(b)—and the IWPCL class—under Rule 23.[3] Class certification is reviewed for abuse of discretion. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir.2010) (reviewing class certification under Rule 23 for abuse of discretion); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir.2001) ("The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court."). A district court may certify a class under Rule 23(b) if "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b). The FLSA allows named plaintiffs to sue "for and in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). Plaintiffs may be similarly situated when "they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien v. Ed*

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[3] The district court conditionally certified the FLSA class, and many employees opted in. *See Genesis Healthcare Corp. v. Symczyk*, —U.S. ——, 133 S.Ct. 1523, 1530, 185 L.Ed.2d 636 (2013) (finding that "employees . . . become parties to a collective action by filing written consent with the court" after conditional certification). While the district court never revisited the conditional certification, the parties treat the FLSA certification as unconditional.

Donnelly Enters., Inc., 575 F.3d 567, 585 (6th Cir.2009). A court may consider "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir.2001).[4]

According to Tyson, factual differences between plaintiffs—differences in PPE and clothing between positions, the individual routines of employees, and variation in duties and management among departments—make class certification improper. These differences, Tyson says, do not allow the class action to "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, ——U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). *See Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 374–76 (8th Cir.2013) (applying *Dukes* and reversing certification when the interaction between individual customers and employees meant liability was "dominated by individual issues"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815 (8th Cir.2011) (denying certification when there were "stark inter-departmental variations in job titles,

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[4] FLSA collective actions and Rule 23 class actions have separate procedures, such as the "opt in" requirement to an FLSA collective action and the "opt out" requirement for a Rule 23 class action. *See Symczyk*, 133 S.Ct. at 1529 (finding Rule 23 precedent inapposite when considering the mootness of an FLSA action with no "opt in" parties). Contrary to the dissent's statement, the Supreme Court in *Symczyk* did not find that these actions "may not be procedurally homogenized for trial" or "do not lend themselves to inextricably intertwined trials." Neither party complains of procedural error from "homogenizing" the claims at trial.

functions performed, and equipment used"). Unlike *Dukes,* Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike *Dukes*, class members worked at the same plant and used similar equipment. The time study showed that donning and doffing all equipment, plus walking, took an average of 18 minutes in the fabrication department and 21 minutes in the kill department. True, applying Tyson's K-code policy and expert testimony to "generate answers" for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) (allowing liability based on "just and reasonable inference" when complete records do not exist). While individual plaintiffs varied in their donning and doffing routines, their complaint is not "dominated by individual issues" such that "the varied circumstances . prevent 'one stroke' determination." *Luiken*, 705 F.3d at 374, 376, *quoting Dukes*, 131 S.Ct. at 2551. The district court did not abuse its discretion in certifying the class.

Tyson also contends that the class should be decertified because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 616 (8th Cir.2011) ("A district court may not certify a class 'if it contains members who lack standing.' "), *quoting Avritt*, 615 F.3d at 1034; *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir.2005) (when "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy damages to all class

members must be shown to justify the class action"). *Cf. Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir.2013) (finding certification improper when piece-rate system varied pay from worker-to-worker, use of an average conferred a "windfall" on some class members, and employees had incentive to under-report time). Tyson exaggerates the authority for its contention. *See Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013) (allowing variation in damages unless "individual damage calculations overwhelm questions common to the class"); *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, —— U.S. ——, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013) ("Rule 23(b)(3) requires a showing that *questions* common to the class predominate, *not that those questions will be answered, on the merits*, in favor of the class.") (second emphasis added); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir.1995) ("The fact that individuals . . will have claims of differing strengths does not impact on the commonality of the class as structured."); *Mejdrech v. Met–Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir.2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop.").[5]

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[5] The dissent says that the class fails because commonality under Rule 23 "requires . . that all class members suffered the same injury," and that "the locution 'injury' includes the measure of a class member's individual damages." Individual damage calculations, however, are permissible if they do not "overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433. The district court found the differences between gang-time employees

At any rate, at Tyson's request, the jury was instructed, "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." Tyson's instruction directed the jury to treat plaintiffs with no damages as class members. It is "fundamental that where the defendant 'invited error' there can be no reversible error." *United States v. Beason*, 220 F.3d 964, 968 (8th Cir.2000), *quoting United States v. Steele*, 610 F.2d 504, 505 (8th Cir.1979).

III.

Tyson believes that plaintiffs improperly relied on a formula to prove liability. In *Dukes*, the Supreme Court disapproved of "Trial by Formula."

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Dukes, 131 S.Ct. at 2561. Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages. Using statistics or samples in litigation is not necessarily

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"small" and allowed individual damage calculations based on undisputed employee timesheets. This was not an abuse of discretion.

trial by formula. *See Comcast*, 133 S.Ct. at 1434 (considering expert's multiple-regression model); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir.2011) (favoring "a calculation based on the summation of mean times" to represent "the amount of time that employees working at the plant actually spend donning and doffing"). *Cf. Martinez v. Ryan*, —— U.S. ——, 132 S.Ct. 1309, 1325 n. 5, 182 L.Ed.2d 272 (2012) (relying on "a sample of federal habeas cases").

Plaintiffs do rely on inference from average donning, doffing, and walking times, but they apply this analysis to each class member individually. Using this representative evidence is comparable to a jury applying testimony from named plaintiffs to find classwide liability. *See* Fed.R.Civ.P. 23 (allowing representative parties when their claims "are typical of the claims or defenses of the class" and they "fairly and adequately protect the interests of the class"). For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated workers. *Mt. Clemens*, 328 U.S. at 684, 66 S.Ct. 1187; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 462 (6th Cir.1945) (discussing testimony). To prove damages, the Court remanded for "the determination of the amount of walking time involved and the amount of preliminary activities performed" based on "whatever reasonable inferences can be drawn from the employees' evidence." *Mt. Clemens*, 328 U.S. at 693–94, 66 S.Ct. 1187.

Tyson claims that plaintiffs presented insufficient evidence to prove damages classwide. *See Murray v. Stuckey's, Inc.*, 939 F.2d 614, 621 (8th Cir.1991) ("[P]laintiffs' evidence failed to show, *for each individual plaintiff*, 'that he has in fact performed

work for which he was improperly compensated.' "), *quoting Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187; *Marshall v. Truman Arnold Distrib. Co., Inc.*, 640 F.2d 906, 911 (8th Cir.1981) (requiring further evidence from non-testifying employees before awarding damages when earnings projections were substantially rebutted by cross-examination). *Cf. Dukes*, 131 S.Ct. at 2560 (requiring "individualized determinations of each employee's eligibility for backpay" as a procedural prerequisite for certification under Title VII). This court "will not reverse a jury verdict for insufficient evidence unless 'after viewing the evidence in the light most favorable to the verdict, [it concludes] that no reasonable juror could have returned a verdict for the non-moving party.' " *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 497 (8th Cir.1998), *quoting Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.1997) (en banc). *See Sandifer v. United States Steel Corp.*, — U.S. ——, 134 S.Ct. 870, 880, 187 L.Ed.2d 729 (2014) (agreeing "with the basic perception of the Courts of Appeals that it is most unlikely Congress meant [the FLSA] to convert federal judges into time-study professionals"). Tyson has no evidence of the specific time each class member spent donning, doffing, and walking. "[W]hen an employer has failed to keep proper records, courts should not hesitate to award damages based on the 'just and reasonable inference' from the evidence presented." *Reich v. Stewart*, 121 F.3d 400, 406 (8th Cir.1997), *quoting Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.1992) (allowing "pattern or practice" evidence when defendant provided "self-serving, unsubstantiated approximations" of employee hours), *citing Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187.

To prove damages, plaintiffs use individual timesheets, along with average times calculated from a sample of 744 observations of employee donning, doffing, and walking. Plaintiffs' expert testified that the sample was large for this type of study, representative, and approximately random. He testified that the study used "accepted procedure in industrial engineering." Tyson's Director of Human Resources testified that K-code time did not include the donning and doffing of much non-unique PPE. Pay data—which came directly from Tyson—showed the amount of K-code time each individual received. Sufficient evidence existed to support a "reasonable inference" of classwide liability. *Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187.

Tyson asserts that even if sufficient evidence supported damages, plaintiffs' claims still fail because it is uncertain if any uncompensated work was performed, citing *Carmody v. Kansas City Board of Police Commissioners*, 713 F.3d 401, 406 (8th Cir.2013) ("*Anderson* [*v. Mt. Clemens Pottery Co.*] only applies where the existence of damages is certain. *Anderson* allows uncertainty only for the amount of damages."). In *Carmody*, the plaintiffs did not "produce[ ] evidence indicating any hours worked over forty hours per week were never paid." *Id.* The plaintiffs "did not provide any evidence of actual damages because the testimony contained no reference to overtime hours that violated the FLSA." *Id.* at 407. Here, Tyson stipulates that "workers at the Storm Lake plant tend to work a significant amount of overtime on a weekly basis." Plaintiffs show uncompensated overtime work by applying average donning, doffing, and walking times to employee timesheets. The evidence is "susceptible to [the] reasonable inference" that the jury's verdict is correct.

Troknya v. Cleveland Chiropractic Clinic, 280 F.3d 1200, 1206 (8th Cir.2002).[6]

* * * *

The judgment is affirmed.

BEAM, Circuit Judge, dissenting.

For two independent but somewhat factually related reasons, this case should be reversed, remanded and dismissed. First, under the circumstances of this litigation, neither the putative Fair Labor Standards Act (FLSA) collective action (the so-called federal class) nor the purported Iowa Wage Payment Collection Law (IWPCL) Rule 23(b)(3) class (the so-called state class) were eligible for class certification, either as a matter of fact or a matter of law. *Wal–Mart Stores, Inc. v. Dukes*, — U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 583–84 (6th Cir.2009); *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir.2001). Second, Rule 23 state-law-based class actions are fundamentally different than collective actions authorized under the FLSA and may not be procedurally homogenized for trial as done in this case.[7] *Genesis Healthcare Corp. v.*

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[6] Tyson also argues that the jury failed to follow the directions of plaintiffs' damages expert, who testified that the jury could choose only "all or nothing" of her model. A jury is not required to follow an expert's conclusion. *See Children's Broad. Corp. v. The Walt Disney Co.*, 357 F.3d 860, 866 (8th Cir.2004).

[7] In its footnote 2, the court takes issue with this observation. In support, the court cites *Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873 (N.D.Iowa 2007), and *Lindsay v. Government Employees Insurance Co.*, 448 F.3d 416 (D.C.Cir.2006). Although subject matter jurisdiction was not in dispute in this case, *Salazar* and *Lindsay* deal with whether a federal cause of action

Symczyk, — U.S. ——, 133 S.Ct. 1523, 1529, 185 L.Ed.2d 636 (2013).

I. BACKGROUND

This litigation generally involves hourly production employees of Tyson Foods at its Storm Lake, Iowa, meat-processing facility. But, the dispute more basically involves six named (lead) plaintiff employees from the kill, cut and retrim departments of the Storm Lake operation who were paid their wages using, in part, Tyson's "gang-time" compensation system but who also claim to have been owed overtime pay resulting from disparate compensable work activities occurring at times other than while earning daily "gang time" kill, cut and retrim department production line compensation. The six attempt to assert two separate collective actions—a federal statutory action asserting violations of the FLSA, 29 U.S.C. §§ 201–219, and a state statutory action separately based upon the IWPCL, Iowa Code Chapter 91A.

This case was originally assigned to the Honorable Mark Bennett who *conditionally* "certified" a federal collective action class pursuant to 29 U.S.C. § 216(b) and a purported IWPCL state law class pursuant to

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(the FLSA) and a state cause of action (the IWPCL) "derive" sufficiently from the same "common nucleus of operative facts" that, when joined, they form part of a case and controversy under Article III of the United States Constitution. *Lindsay*, 448 F.3d at 424 (quotation omitted), *Salazar*, 527 F.Supp.2d at 880 (quotation omitted); *See* 28 U.S.C. § 1367(a). But, "case and controversy" standing is not the fundamental issue here. The question is whether the separate federal and state claims were sufficiently identical to be presented to the jury, as here, as one amalgamated cause of action. In my view, Supreme Court precedent indicates they were not.

Federal Rule of Civil Procedure 23(b)(3). Then, because the Honorable John Jarvey was already assigned to several comparable cases involving Tyson, including a case involving Tyson employees at Columbus Junction, Iowa, *Guyton v. Tyson*, No. 3:07–cv–00088–JAJTJS (S.D.Iowa) (a companion case on appeal), this matter was transferred to Judge Jarvey for further pretrial and post-trial proceedings and for trial. The case has now been litigated and is before this panel on appeal.

II. DISCUSSION

1. The Classes

A. The Federal FLSA Class

A collective action to recover damages permitted by the FLSA "may be maintained against any employer . in any Federal or State court of competent jurisdiction by anyone or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). However, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

The six named lead plaintiff employees who sought to establish this collective action bore the "burden of showing that the opt-in [consenting] plaintiffs are similarly situated to the lead plaintiffs." *O'Brien*, 575 F.3d at 584. Judge Bennett, apparently recognizing the likely existence of numerous factors unrelated to the "gang-time" pay used to determine a given Tyson employee's regular wages—factors amply established by the evidence at trial—certified a "conditional" FLSA class consisting of employees from the kill, cut and retrim departments at the Tyson plant paid

through the so-called gang-time compensation system within a discrete time period set forth in the certification. Indeed, the conditional certification related only to the three departments and the gang-time pay earned in the production line in those departments. No other regular or overtime pay calculation factors discussed at the merits portion of the trial (such as: individual employment codes, specific duties, wage-rate variations, knife wielding protections, sanitary clothing and equipment, part-time work, illness, injury, shift differentials, and routine production line overtime) were in any way incorporated as limitations on the use of the FLSA conditional class. The record reveals that this "conditional" designation was never withdrawn or modified at any time during or after the trial. According to the joint stipulation of facts by the parties, there were 444 employees who consented to be a part of this FLSA collective action class *including the six named lead plaintiffs*.

B. The IWPCL State Class

" 'In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met.' " *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir.2013) (quoting *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir.1994)). Judge Bennett, at the request of the same six named plaintiffs who sought creation of and joined the FLSA collective class, ultimately certified what he termed a "modified" 3,344–person putative Rule 23 state law class consisting of all "current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2005, to the present, and who are or were paid under a 'gang-time'

compensation system in the Kill, Cut or Retrim departments." This certification also included no other limiting or enhancing overtime pay calculation elements. The record discloses that this certification was likewise never further embellished or modified during or after trial.

The "gang-time system of payment" as referred to by Judge Bennett and defined by the evidence is a system where employees are paid from the time their production line starts to the time their production line ends. There is no contention by the named plaintiffs that the Storm Lake Tyson employees did not receive all wages due and owing for time worked during the production line gang-time pay periods. So, standing by itself, as it does in the class certifications, the gang-time production line classification means little in the context of proving at trial through evidence common to the class the overtime pay claims of the 3,344 members of the allegedly underpaid overtime class. Supreme Court and Eighth Circuit precedent demands otherwise. *See Dukes*, 131 S.Ct. at 2549–50 (discussing the requirements of class certification); *see also Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 874 (8th Cir.2012) (an employee who sues for unpaid overtime has the burden of proving he performed work for which he was not properly compensated).

To be certified for purposes of Rule 23(a), the collective groupings, that is the putative classes, must have been such that Tyson was positioned to assert its legitimately held common-to-the-class defenses against all members of the group who claimed to have earned unpaid overtime wages. *See* Fed.R.Civ.P. 23(a)(3). In this same context, the class must have been limited to Tyson employees who could and did establish entitlement to overtime pay resulting from

overtime work performed during compensable time, that is, work performed at times other than production line gang-time pay periods-periods for which all class members were already routinely, regularly, and unquestionably paid by Tyson in accordance with the law.

"In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Luiken*, 705 F.3d at 372 (quotation omitted). While a Rule 23(b)(3) class was purportedly certified, any Rule 23 class may only be lawfully certified if the "trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 131 S.Ct. at 2551 (quotation omitted). Actual, not presumed, conformance with Rule 23(a) remains indispensable. *Id.* Frequently, as in this case, " 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* Rule 23(a)'s four bedrock requirements are numerosity, commonality, typicality and adequate representation (here, a named plaintiff with standing). Commonality requires the plaintiff to demonstrate at the time of the merits hearing on the underlying claim—that all class members suffered the same injury. *Dukes*, 131 S.Ct. at 2551. So, if the locution "injury" includes the measure of a class member's individual damages, as I believe it does, this class fails on that score alone.

The court majority apparently sees a pathway around plaintiffs' legal dilemma arising from the above-noted class formulation failures. Although acknowledging that class certification is improper when a "windfall" is conferred on some class members, *ante* at 797, the court makes the following observation:

> At any rate, at Tyson's request, the jury was instructed, "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." Tyson's instruction directed the jury to treat plaintiffs with no damages as class members. It is "fundamental that where the defendant . 'invited error' there can be no reversible error." *United States v. Beason*, 220 F.3d 964, 968 (8th Cir.2000) (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir.1979)).

Ante at 798.

Thus, says the court, Tyson "directed the jury to treat plaintiffs with no damages as class members." However, Tyson made no such class membership directive to the jury through its instructional request and *Beason* and *Steele* are wholly inapposite as case precedent for the court's faulty premise. The cases deal only with run-of-the-mill evidentiary matters, not waivers of legal principles. *Beason* simply opened the door to the making of a *Bruton* exception by permitting an admission from a non-testifying co-defendant, and *Steele* admitted otherwise inadmissible hearsay evidence to clarify and rebut an issue opened by the criminal defendant's cross-examination. Tyson, after vigorously resisting class action formulations at every turn in this litigation, and being denied, properly requested an instruction that the plaintiffs be held to their evidentiary burdens of proof.

C. The Merits

Fundamentally, as previously noted, this case emerges from two separate causes of action brought through a single federal court complaint—a federal

law cause of action alleging liability leading to damages arising from violation of the FLSA and a state law cause of action alleging liability and damages arising from violation of the IWPCL. The burden of proof on all issues of statutory liability, injury and measure of damages rests squarely upon the shoulders of the named plaintiffs. *Lopez*, 690 F.3d at 874. In this case, gang-time pay is not in dispute. The plaintiffs contend, as does the court majority, that the overtime pay dispute involves time spent by a class of Tyson employees in doffing and donning various sanitary and personal protection equipment before and after the gang-time production line work has been completed each day.

Tyson's Storm Lake employees are required to wear a different combination of sanitary and protective gear. Those employees wearing knives to use in conjunction with their particular duties on a particular day are required to wear a combination of a plastic belly guard, mesh apron, mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining the knives and knife scabbards ("knife related gear"). Other workers are required to wear a hard hat, hairnet, beard net, earplugs, ear muffs, rubber or cotton gloves, and rubber or plastic aprons ("sanitary gear").

From 1998 until February 4, 2007, Tyson paid four extra minutes beyond production line time for all production employees, referred to as "K–Code" time. From February 4, 2007, to June 28, 2010, Tyson ceased paying non-knife-wielding employees for the time donning and doffing sanitary gear. From February 4, 2007, to June 28, 2010, Tyson paid knife-wielding employees between 4 to 8 minutes of K–Code

time, depending on the job, and employees who did not have a knife did not receive K–Code time payments.

Plaintiffs offered evidence at trial concerning a sample of putative class employees from Dr. Kenneth Mericle and Dr. Liesl Fox. Fox's calculation testimony fed off of Mericle's evidence concerning Rule 23 class damages for overtime pay. Fox testified, assuming Mericle's evidence was true, that at least 212 members of the purported class did not suffer any damages because the doffing and donning time, less the K–Code time "would not have been enough to kick them into overtime." Further, while the plaintiffs' evidence generally indicated some individual overtime damages ranging from a few cents to several thousand dollars, there were at least 509 workers whose injuries ranged from $0.27 to less than $100. And, the record discloses that the jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury measured in cents rather than dollars. In spite of having the burden of proof, there was no evidence adduced by plaintiffs that established the number of purported class member employees fully compensated or not fully compensated by the K–Code payments already paid by Tyson. It is evident, however, that many class employees fit within each category and all were apparently included as beneficiaries of the single damages verdict returned by the jury.

Rule 23(a)(2) contemplates that "there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of

the same provision of law." *Dukes*, 131 S.Ct. at 2551 (quotation and citation omitted). Rather, "[t]heir claims must depend upon a common contention. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification is not the raising of common 'questions' but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (first alteration and italics in original) (quotation omitted). That was not the case here. While it is true that all class members were subject to a common policy—gang-time payment—there is no "common answer," arising from the evidence concerning the individual overtime pay questions at issue in this case. Thus, this case with these classes cannot be resolved in "one stroke," given the differences in donning and doffing times, K–Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation and a myriad of other relevant factors. The "rigorous" analysis of class certification in this case, which overlaps with the merits as required by *Dukes*, 131 S.Ct. at 2551, clearly discloses that the Rule 23 class claim does not comply with either rule or precedent and should have been decertified

Finally, the wisdom of the Supreme Court's statement in *Symczyk*, 133 S.Ct. at 1530, that Rule 23 class actions and collective actions under the FLSA are fundamentally different and thus do not lend themselves to inextricably intertwined trials, as here,

is well dramatized by this case.[8] Here we have undifferentiated presentations of evidence, including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages, ultimately resulting in a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict. Assuming that the district court could now re-open the proceedings in an effort to deal with an individual plaintiff's damages using the Mericle/Fox evidence, the exercise would be laborious, virtually unguided, and well outside of the limiting parameters the Supreme Court has, as a matter of law, placed upon use of the Rule 23 class action machinery.

III. CONCLUSION

From this result, I dissent.

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[8] In footnotes 3 and 4, the court again takes issue with this contention. Interestingly, in doing so, the court cites *Symczyk*, a case that clearly holds to the contrary. In *Symczyk*, the Supreme Court, in discussing an FLSA mootness issue and the applicability, or not, of Rule 23 class action cases to that particular question, stated: "Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S.Ct. at 1529. And then more to the point here, the Supreme Court held that although a putative class acquires "independent legal status once it is certified under Rule 23[, u]nder the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved notification to employees." *Id.* at 1530. Thus, the FLSA class in this case never progressed beyond "conditional" status and could not, as a matter of law, have been joined with the supposed Rule 23 class in an actionable claim of any kind, however the parties may have chosen to treat this conditional effort, which treatment is unclear from the record.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. 5:07–cv–04009
Sept. 26, 2012.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER

JOHN A. JARVEY, District Judge.

This matter comes before the Court on Defendant's motion for a judgment as a matter of law and motion to decertify or, in the alternative, for a new trial on damages, filed on October 24, 2011. [Dkt. No. 305]. Plaintiffs filed their resistance to Defendant's motion on November 15, 2011. [Dkt. No. 310]. Defendant replied to Plaintiffs' resistance on December 1, 2011. [Dkt. No. 313]. For reasons more fully explained below, the Court denies Defendant's motion.

I. FACTUAL BACKGROUND

These motions stem from a five-year dispute between the parties that culminated in a two-week trial in Sioux City, Iowa in September of 2011. The

Plaintiffs are all current or former employees of Defendant at their Storm Lake, Iowa facility. All Tyson production workers at the Storm Lake plant wear at least some items of personal protective equipment ("PPE"), which includes hard hats, ear plugs, boots, frocks, hair nets, hard plastic arm guards, mesh aprons, mesh sleeves or Kevlar sleeves, scabbards, cotton gloves, rubber gloves, cut-resistant (Kevlar) gloves, and mesh gloves.

Tyson Storm Lake hourly production workers must have all required and cleaned PPE on before the first piece of meat product reaches their work station on the assembly line. Employees are not permitted to perform work on the production line without wearing all required PPE, and they are disciplined if they are not wearing their required PPE. Tyson pays its Storm Lake hourly production workers, in part, on a "gang time" basis. "Gang time" is the time that the processing lines are moving and during which production workers are physically at the assembly line while the lines are moving and producing product. In and of itself, "gang time" does not record time that production workers spend donning, doffing, and cleaning themselves and their PPE before and after "gang time" and at unpaid meal breaks. In addition to "gang time" Tyson pays its hourly production workers "extra" minutes per day to compensate them for donning, doffing, and washing their PPE. The payment of "extra" minutes beyond the "gang time" for donning and doffing activities is referred to as "K–Code" time.

The parties have long disputed whether or not this K–Code time adequately compensates employees for the time they spend donning and doffing their PPE. In February 2007 Plaintiffs filed suit against Defendant

alleging violations of the Fair Labor Standards Act and the Iowa Wage Payment Collection law. Both a collective action under the Fair Labor Standards Act and a Rule 23 class were certified in this matter, and the case proceeded as a collective and class action. In September of 2011 a jury trial was held among the parties to resolve these issues. After the parties presented evidence to the jury for nine days, the case was submitted to the jury on September 23, 2011. The jury returned with a verdict on September 26, 2011. The jury found that the plaintiffs proved that the time spent donning and doffing their PPE was "work" within the meaning of the Fair Labor Standards Act; that this "work" was "integral and indispensable" to the employees' gang-time work; that the meal break was a bona fide meal period; that the donning and doffing activities at issue in the case were not "de minimis," and that the plaintiffs proved that they were entitled to additional compensation for their donning and doffing activities. The jury awarded $2,892,378.70 in damages to the Plaintiffs.

II. LEGAL STANDARD

a. Judgment as a Matter of Law

"Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party." *S. Wine and Spirits of Nev. v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 534 (8th Cir.2011) (citing *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 860 (8th Cir.2002)). In the Court's analysis, "we may not weigh the credibility of evidence, and conflicts in the evidence must be resolved in favor of the verdict." *Id.* (citing *Schooley v. Orkin Extermination, Co., Inc.*, 502 F.3d 759, 764 (8th Cir.2007)). If no evidence supports the nonmoving party—that is, if all the evidence points in favor of the

moving party—then the Court may grant a motion for judgment as a matter of law. *Johnson v. Texarkana Ark. Sch. Dist. No. 7*, Slip Copy, 2012 WL 527907, at *1 (W.D.Ark. February 16, 2012).

"Where conflicting inferences reasonably can be drawn from the evidence, it is the role of the jury, not the court, to determine which inferences shall be drawn." *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir.2002). Therefore, it is inappropriate for this Court to overturn a jury verdict "unless, after giving the nonmoving party the benefit of all reasonable inferences and resolving all conflicts in the evidence in the nonmoving party's favor, there still exists a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party." *Id.* (internal quotation omitted).

b. New Trial

This Court may order a new trial only under the circumstances where a "miscarriage of justice" would occur without one. *White v. Pence*, 961 F.2d 776, 780 (8th Cir.1992) ("When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not." *Id.*) "A new trial may not be granted on the grounds that a jury's verdict is excessive unless the court concludes that the jury's verdict is a plain injustice or a monstrous or shocking result." *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 475 (8th Cir.1987) (internal quotations omitted).

III. DISCUSSION

In this case it cannot be said that no reasonable juror could have found for the Plaintiffs, or that the jury's verdict was a monstrous or shocking result.

Defendant argues that the evidence at trial was not sufficient to support liability because Plaintiffs failed to show that each individual employee had not already been fully compensated for any overtime hours they worked. However, Plaintiffs called two experts to help determine both liability and damages. Dr. Kenneth Mericle conducted a time study at Defendant's facility and determined how much time Plaintiffs spent donning and doffing their PPE. Dr. Leisle Fox used these numbers to calculate the amount of money owed to each Plaintiff for these activities. Dr. Fox did this by creating a database that included all Plaintiffs. [Tr. Ex. 349]. In this database, she made calculations for each Plaintiff individually by subtracting what was already paid to the employee in K-code time or determining if the employee was not owed extra payment for the week because their work did not exceed 40 hours and calculated what was owed to them on a week-by-week basis.

Additionally, Plaintiffs provided evidence from several opt-in plaintiffs, as well as Tyson employees, who testified to the general practices of employees regarding the donning and doffing of PPE. This included which PPE items were used by different groups of employees—including knife-wielders and non-knife-wielders—how often people donned and doffed these items, how these items were stored, cleaned, and sanitized, and how long it generally took for people to don and doff the items. Also included in the evidence was testimony regarding Defendant's practice of paying on the "gang time" system and adding K-code time to individual employees' paychecks in order to compensate them for the time the company believed it should take the employees to don and doff their PPE. Witnesses also testified that

Plaintiffs spent more time donning and doffing their PPE than Defendant paid them in K-code time.

The Court finds this evidence was sufficient for the jury to conclude that Defendant was liable for violating the Fair Labor Standards Act and the Iowa Wage Payment Collection Law, and that it was also sufficient for their damages calculations. It is not the role of the Court to attempt to divine the motivations of the jury or to determine the precise calculations of the damages they awarded. *See LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 354 (8th Cir.1981) ("The trial judge is not free to speculate as to the reasons for the jury's verdict." *Id.*) Instead, the Court must only look to see if there was sufficient evidence in the record from which the jury could make the determinations they did. Plaintiffs provided sufficient evidence in the form of witness testimony and the expert calculations of Dr. Mericle and Dr. Fox. In this case, there is not a complete absence of probative facts to support the conclusion, nor did a miscarriage of justice occur. The Court concludes that the Defendant failed to meet the heavy burden the law requires to overturn a jury's verdict and award of damages.

IV CONCLUSION

Upon the foregoing,

IT IS ORDERED that Defendant's Motion for a Judgment as a Matter of Law and Motion to Decertify or, in the alternative, for a New Trial on Damages [Dkt. No. 305] is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. 5:07–cv–04009–JAJ
Aug. 25, 2011.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER

JOHN A. JARVEY, District Judge.

This matter comes before the court pursuant to defendant's July 27, 2011 motion for decertification of Rule 23 class [dkt. 212]. Plaintiffs filed their opposition to defendant's motion to decertify Rule 23 class on August 19, 2011 [dkt. 227]. Defendant filed its reply brief on August 24, 2011 [dkt. 226–1].

Defendant argues that the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (June 20, 2011) mandates decertification of the plaintiffs' Rule 23 class. Defendant argues that

decertification is warranted because the court's[1] order granting class certification found that defendant's gang time compensation system was the "tie that binds" the class together under a single purported common question of law, and the Supreme Court in *Dukes* held that common questions of law are not sufficient to certify a class. Further, defendant claims that plaintiffs' use of a "representative sample" of hourly employee witness to prove class claims is prohibited by *Dukes*, which makes clear an employer's entitlement to individualized determinations of each class member's eligibility for back pay and expressly rejects certification of back pay claims proven through a "sample set" of class members whose damages are extrapolated to the entire class.

Plaintiffs argue in their resistance to defendant's motion to decertify should be denied because, unlike *Dukes*, this case involves no individual-by-individual determinations, and defendant's de minimus defense likewise must be answered across-the-board "in one stroke" for the class as a whole. Plaintiffs claim that this case satisfies the *Dukes* standard for commonality because a "common answer" is required for the following dispositive question: whether the subject activities are "work" and "integral and indispensable" to a principal activity because they are necessary to job performance and primarily benefit the defendant.

The court has studied the *Dukes* decision and finds its holdings and analysis largely inapplicable to and/or

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[1] *See* Judge Bennett's July 3, 2008 Memorandum Order and Opinion Regarding Plaintiffs' Motions for Conditional Certification as a Collective Action under the FLSA and Certification as a Class Action under Rule of Civil Procedure 23 [dkt. 62].

distinguishable from the instant case. In *Dukes* the District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs nationwide, current and former female employees of Wal-Mart who alleged that the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women. *Dukes*, 131 S.Ct. at 2547. In additional to injunctive and declaratory relief, the plaintiffs in *Dukes* also sought an award of backpay. *Id.* It was undisputed in *Dukes* that pay and promotion decisions were generally committed to "local managers' broad discretion, which is exercised 'in a largely subjective manner' " with only limited corporate oversight. *Id.* The plaintiffs in *Dukes* never alleged that Wal-Mart had an express corporate policy against the advancement of women, but rather claimed that their local managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. *Id.* at 2548. As described by the Court:

> Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice.

Id.

As evidence in support of the "commonality" requirement of Rule 23(a)(2), the plaintiffs in *Dukes* relied primarily on three forms of proof. *Id.* at 2549. First, plaintiffs provided statistical evidence about pay and promotion disparities between men and women at Wal-Mart. *Id.* Second, plaintiffs produced anecdotal reports of discrimination from about 120 of Wal-Mart's female employees. *Id.* Third, plaintiffs relied on the testimony of a sociologist who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. *Id.*

Noting that the "crux of this case is commonality," the court noted:

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon*, *supra*, at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of

> classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at 2551.

As *Dukes* was a Title VII case, the focus of the inquiry in resolving each individual's claim was "the reason for [the] particular employment decision." *Id.* at 2552 (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984)). As such, *Dukes* involved "literally millions of employment decisions" and "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it [would] be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*" *Id.*

Similar to *Dukes*, the Supreme Court in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) rejected a class comprising all employees wrongfully denied promotions and all applicants wrongly denied jobs for lack of commonality and typicality. Specifically, the Court held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." *Id.* at 158. The Court in *Falcon* suggested two ways in which commonality and typicality may have been shown. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.* at 159, n. 15. Second, "[s]ignificant proof that an employer operated under a

general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.*

Noting the absence of "significant proof" that Wal-Mart was operating under a "general policy of discrimination," and further noting that Wal-Mart's announced policy actually forbids sex discrimination, the Court in *Dukes* found that the only policy established by plaintiffs' evidence was Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters which is "just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Dukes*, 131 S.Ct. at 2554.

> [D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.
>
> [Plaintiffs] have not identified a common mode of exercising discretion that pervaded the entire company . . . In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. [Plaintiffs] attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

Id. at 2554-55.

With respect to the Rule 23 class at issue, this court disagrees with the defendant's contention that Judge Bennett certified a Rule 23 class based on what he found to be a single common question of law: "whether Tyson's gang time compensation system violates the law." In addition to the common legal question identified by Judge Bennett, which this court has interpreted *not* to be a challenge to the legality of the "gang time" system per se, but rather whether the defendant has paid its production workers for all "work" performed prior and subsequent to "gang time," particularly the time spent donning, doffing, and cleaning PPE, Judge Bennett also noted numerous factual similarities among the employees paid on a "gang time" basis. Unlike *Dukes*, there is a common answer available to this question because, unlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility. If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs. The instant matter is not like *Dukes* where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process. Moreover, the court does not see the same evidentiary defects in the instant case as those addressed in *Dukes*, as the instant case is supportable by class-wide proof.

Finally, the court finds inapplicable and/or distinguishable the analysis/holding of *Dukes* as it pertains to plaintiffs' claims for backpay. The class in *Dukes* was certified pursuant to Rule 23(b)(2), which "allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.' " *Dukes*, 131 S.Ct. at 2257 (quoting Rule 23(b)(2)). Rather, Judge Bennett found that the class was properly certified under Rule 23(b)(3). As noted by the Court in *Dukes*, "We think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2558.

Upon the foregoing,

IT IS ORDERED that defendant's motion for decertification of Rule 23 class [dkt. 212] is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C07-4009-MWB

PEG BOUAPHAKEO, ET AL.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER UNSEALING MEMORANDUM OPINION AND ORDER ON PLAINTIFFS' MOTIONS FOR COLLECTIVE ACTION AND CLASS ACTION CERTIFICATION

On July 3, 2008, the court filed its memorandum opinion and order on Plaintiffs' motions for collective action certification under the Fair Labor Standards Act, and class action certification under Federal Rule of Civil Procedure 23. Dkt. # 62. The parties previously entered into a protective order to keep certain information confidential throughout the litigation of this case. Dkt. # 29. The parties also sealed their briefs when arguing their positions relative to the collective action and class action certification of Plaintiffs' claims. As a result, the court filed its memorandum

opinion and order on collective action and class action certification under seal. Dkt. # 62.

After considering the confidentiality concerns espoused by the parties in their protective order, the court does not believe its memorandum opinion and order needs to be sealed. Therefore, the court orders its memorandum opinion and order, Dkt. # 62, to be *unsealed*.

IT IS SO ORDERED.

DATED this 14th day of July, 2008.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

APPENDIX E

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. C 07–4009–MWB.
July 3, 2008.

PEG BOUAPHAKEO, JAVIER FRAYRE, JOSE A. GARCIA, MARIO MARTINEZ, JESUS A. MONTES, AND HERIBENTO RENTERIA,[1]

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFFS' MOTIONS FOR CONDITIONAL CERTIFICATION AS A COLLECTIVE ACTION UNDER THE FSLA AND

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[1] Previously, this case was captioned as "Dale Sharp, et al. v. Tyson Foods, Inc." to account for ten named plaintiffs. Six of these plaintiffs (those named in the present caption) worked at Tyson's Storm Lake, Iowa, facility. The remaining four plaintiffs (Sharp, Brian Fryar, Courtney Knutson, and Mike Sturtevant) worked at Tyson's Denison, Iowa, facility. The Denison, Iowa, plaintiffs are no longer involved in this lawsuit as a result of the parties voluntarily dismissing the claims against Tyson's Denison facility. Therefore, the court has restyled the caption to include only those named plaintiffs from Tyson's Storm Lake facility.

CERTIFICATION AS A CLASS ACTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

[TO BE FILED UNDER SEAL]

MARK W. BENNETT, District Judge.

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Plaintiff employees request the court to allow them to proceed as representatives of a group of employees against Defendant for its allegedly illegal wage payment practices. Several issues must be addressed in considering Plaintiffs' request, but one question stands out: Does Defendant's "gang time" compensation system allow Plaintiff employees to gang up on Defendants?

I. INTRODUCTION

Plaintiffs Dale Sharp, et al., filed a "Class Action and Representative Action Complaint" against Defendant Tyson Foods, Inc., on February 6, 2007. Dkt. # 2. Plaintiffs bring two claims against Tyson: (1) a class action under Federal Rule of Civil Procedure 23 for Tyson's alleged violations of the Iowa Wage

Payment Collection Law (IWPCL), and (2) a collective action under 29 U.S.C. § 216(b) for Tyson's alleged violations under the Fair Labor Standards Act (FLSA). Plaintiffs state the court has subject matter jurisdiction over their IWPCL claim under 28 U.S.C. § 1332(d) (diversity jurisdiction for class actions), and subject matter jurisdiction over their FLSA claim under 28 U.S.C. § 1331 (federal question jurisdiction). Tyson filed its answer, raising many affirmative defenses, on March 28, 2007. Dkt. # 15.

On July 6, 2007, the court approved a scheduling order and discovery plan. Dkt. # 23. The court limited discovery to class certification issues, and set deadlines for the parties' briefs related to class action and collective action certification. On November 27, 2007, the court approved the parties' protective order to keep certain information confidential during the parties' discovery and litigation of this lawsuit. Dkt. # 29. On February 4, 2008, Plaintiffs filed a renewed sealed motion for the court to conditionally certify its FLSA claim as a collective action under the FLSA. Dkt. # 34. On the same date, Plaintiffs also filed a renewed sealed motion for the court to certify its IWPCL claim as a class action under Rule 23. Dkt. # 35. Tyson responded with its resistance to Plaintiffs' motion for class certification on March 4, 2008, Dkt. # 45, and with its resistance to Plaintiffs' motion for conditional certification on March 5, 2008, Dkt. # 49. Plaintiffs then filed their replies on March 26, 2008. Dkt. # 59. No party has requested oral arguments on the class certification and conditional collective action certification issues. As a result, the matter is fully submitted. The trial date has not yet been set, but a telephonic status conference is set for July 9, 2008, before Chief Magistrate Judge Paul A. Zoss. Dkt. # 61.

II. FACTUAL BACKGROUND

There were originally ten named plaintiffs in this action, but only six remain due to the dismissal of all claims involving Tyson's Denison, Iowa, facility. Dkt. # 40. The six remaining plaintiffs are current or former production employees who work or who have worked for Tyson's Storm Lake, Iowa, pork processing facility. Tyson's facility in Storm Lake receives, slaughters, and processes hogs into various cuts of pork that are then packaged and shipped to other Tyson facilities or directly to customers. The Storm Lake facility has approximately 1,600 hourly production and support employees that work on three shifts. These employees work in six main departments: the Kill, Cut, Retrim, Materials Handling/Load Out, Rendering, and Maintenance departments. Most of the hourly employees work in the Kill, Cut, and Retrim departments. None of the six remaining named plaintiffs have worked in the Rendering, Load Out, or Maintenance departments at Tyson.

All hourly production employees are required to clock in and out before and after their shift. Clocking in and out is generally only for attendance purposes. Clocking in and out only affects an employee's paid time if the employee clocks in late (in which case the employee's pay is reduced) or comes in early or stays late to perform set up and clean up work (in which case the employee's pay is increased). The employees in the Kill, Cut, and Retrim departments are paid by "gang time,"[2] or the length of production in their department,

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[2] Gang time is also sometimes called "line time," "shift time," or "mastercard time." *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1302 (11th Cir.2008) (mastercard time); *Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 879 (N.D.Iowa 2007) (line time);

which is generally the time it takes for hogs to travel on mechanized belts through the department. More specifically, gang time begins when the first hog or piece of pork "hits the floor" of the specific department, and gang time ends when the last hog or piece of pork "hits the floor" in that department. As a result, gang time represents the amount of work each employee performs while on the production line, and those employees at the beginning of the production line start and end a few minutes earlier than those employees at the end of the production line. The employees in the Rendering, Materials Handling/Load Out, and Maintenance departments are not paid by gang time. Instead, these employees are paid based on a pre-set start time until a pre-set end time.

In addition, most hourly employees at Tyson are given a "K code" value to compensate them for the work they perform donning and doffing their Personal Protective Equipment (PPE) before and after their shift begins. PPE is the clothing Tyson provides their employees and requires them to wear to perform their jobs. Prior to 2007, Tyson paid every employee within certain departments an extra four minutes to compensate them for the extra time they needed to don and doff their PPE. In 2007, and as a result of the United States Supreme Court decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), Tyson changed its K code policy. Now, all Tyson employees are given a K code value specific to their positions to represent the extra time they need to be compensated for donning and doffing their PPE. Some are not given any K code value, but those that

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Saunders v. John Morrell & Co., No. C88–4143, 1991 WL 529542, at *7 n. 2 (N.D.Iowa Dec. 24, 1991) (shift time).

don and doff PPE are given a K code value somewhere between four and seven minutes.

All hourly production employees are required to wear certain PPE, but not all wear the same PPE. Employees often wear PPE such as hard hats, hairnets, beard nets (if applicable), rubber soled or steel-toed boots, hearing protection, rubber or cotton or kevlar or mesh gloves, company issued shirts and pants ("whites"), frocks, belly guards, aprons, and arm guards. In addition, most employees throughout the plant use knives, and these employees are required to wear additional clothing as added protection. Most employees who use knives are required to dip their knife and related equipment[3] in a sanitizing solution before beginning production work. Likewise, when leaving the department, the employee must perform the same sanitation procedure. In addition, at the end of their shift, these employees are required to rinse their knives and related equipment at one of several wash nozzles either in the production area or immediately outside the production area at the wash station. Employees who are required to wear a frock, "whites," hard hat, hairnet, beardnet, steel-toed boots, and earplugs must have these items on before entering the production area. All hourly employees are assigned a locker in the main locker rooms off the production hallway, which the employees use to store their required and optional clothing items and equipment. Hourly production employees receive one fifteen minute paid break and one thirty minute unpaid meal period per shift. Employees do not have

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[3] Employees that use knives have scabbards to contain their knives and steels to sharpen their knives. As of April 2007, Tyson's Storm Lake facility uses no-maintenance steels that do not require sanding. [D. ex. 22].

to perform any washing or sanitizing during their meal period.

III. COMPATIBILITY OF FLSA AND IWPCL CLAIMS

The specific circumstances of this case must be made absolutely clear. Plaintiffs have two claims against Tyson: a federal law FLSA claim, and a state law IWPCL claim. The court has subject matter jurisdiction over the federal law claim because it is based on federal law. *See* 28 U.S.C. § 1331. The court has subject matter jurisdiction over the state law claim because the parties meet the requirements for diversity jurisdiction under the Class Action Fairness Act of 2005 (CAFA).[4] Plaintiffs ask the court to certify their federal law claim as a "collective action" under § 216(b) of the FLSA. Plaintiffs also ask the court to certify their state law claim as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

Tyson argues Plaintiffs cannot bring both the FLSA claim and the IWPCL claim in the same action because the Plaintiffs' FLSA claim preempts Plaintiffs' IWPCL claim in this case. Tyson additionally argues that Plaintiffs' IWPCL claim and request for class certification under Rule 23 should be either denied, dismissed, or limited because the class certification procedure under Rule 23 is fundamentally opposed to the collective action certification procedure under

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[4] CAFA gives the district court original jurisdiction over civil class actions where there are more than 100 class members, more than $5,000,000 is in controversy, any member of the class is diverse from any defendant, and the primary defendants are not governmental entities. Class Action Fairness Act of 2005 (CAFA), Pub.L. No. 109–2, § 4, 119 Stat. 4, 9 (2005) (codified at 28 U.S.C. § 1332(d)(2), (5)).

§ 216(b). Tyson's arguments address the compatibility of FLSA and state law claims, and they have been the subject of many district court dockets recently. *See, e.g., Ellis v. Edward D. Jones & Co., L.P.*, 527 F.Supp.2d 439, 459 n. 19 (W.D.Pa.2007) (noting the "recent phenomenon" of the " 'explosion' of hybrid lawsuits involving both state and FLSA claims"). Unfortunately, however, circuit court opinions are rare on the issues confronted in these circumstances, and there is an overall paucity of decisions on the subject in the Eighth Circuit. The court is, therefore, navigating some relatively uncharted, or at least rough, waters in addressing these arguments.[5] The court will first address the issue of preemption, followed by Tyson's arguments against dual certification.

A. Preemption

The Supremacy Clause "states that the laws of the United States made pursuant to the Constitution are the 'supreme Law of the Land.' " *Wuebker v. Wilbur–Ellis Co.*, 418 F.3d 883, 886 (8th Cir.2005) (quoting U.S. Const., Art. VI, cl. 2). Whether federal law preempts state law is a question of congressional intent. *Id.* ("Congressional intent is the touchstone for determining the preemptive effect of a statute." (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990))). The United States Supreme Court has identified a three-part "categorical framework" to discern whether Congress meant to

[5] The waters are made rougher because the cases that address the issues in this case are often unpublished. The court regrets analyzing the issues with the help of authority not recommended for publication. The court feels compelled, however, to address all the decisions in this area, whether published or not, because not many decisions exist at all.

preempt state law. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151–52 (9th Cir.2000). According to this framework,

> [c]ourts discern an intent to preempt state law when Congress expressly forbids state regulation (express preemption), when it creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption), and when a law enacted by it directly conflicts with state law (conflict preemption).

Wuebker, 418 F.3d at 886 (citing *English*, 496 U.S. at 78–79, 110 S.Ct. 2270). Notably, the three categories of preemption—express, field, and conflict—are not "rigidly distinct." *English*, 496 U.S. at 79 n. 5, 110 S.Ct. 2270.

In this case, and keeping in mind that the three categories of preemption are somewhat related, the only question is whether Plaintiffs' IWPCL claim is barred under a conflict preemption analysis. Express and field preemption do not apply because Congress did not specifically prohibit state regulation in this area. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 n. 10 (4th Cir.2007) (addressing the similar question of whether plaintiff's state law contract, negligence, and fraud claims were preempted by the FLSA, and finding "there is no question that express preemption and field preemption are inapposite to this dispute"); *Williamson*, 208 F.3d at 1151–52 (addressing the similar question of whether plaintiff's common law fraud claim was preempted by the FLSA, and focusing on whether conflict preemption

applied).[6] In fact, the FLSA contains a savings clause that allows states to enact their own laws in this area. 29 U.S.C. § 218(a). Moreover, Tyson does not specifically argue express or field preemption applies. Instead, Tyson relies almost exclusively on the recent Fourth Circuit Court of Appeals's decision in *Anderson*—which used a conflict preemption analysis—for its argument that Plaintiffs' IWPCL claim is preempted by the FLSA.

Conflict preemption, also called implied preemption, can occur in two ways: "when it is impossible for a private party to comply with both state and federal law, and when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wuebker*, 418 F.3d at 887 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000)); *see Williamson*, 208 F.3d at 1152 (noting the two types of conflict preemption). Tyson does not argue that it is impossible for Tyson to comply with both the FLSA and the IWPCL, and the court is unaware of any reason why dual compliance would not be possible. Therefore, the relevant question in this case, as it was in *Anderson* and *Williamson*, is whether the state law claim "stands as an obstacle" to Congress's objectives in the FLSA. "In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Forest Park II v. Hadley*, 336 F.3d 724, 733 (8th Cir.2003) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494,

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[6] The Fourth Circuit Court of Appeals's decision in *Anderson* in 2007, and the Ninth Circuit Court of Appeals's decision in *Williamson* in 2000, appear to be the only two recent federal appellate decisions that substantively address FLSA preemption.

107 S.Ct. 805, 93 L.Ed.2d 883 (1987)). State law is "preempted if it interferes with the methods by which the federal statute was designed to reach that goal." *Id.* "Thus, '[w]here a state statute conflicts with, or frustrates, federal law, the former must give way.' " *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)).

In *Anderson*, the Fourth Circuit Court of Appeals held that "Congress prescribed exclusive remedies in the FLSA for violations of its mandates" and, therefore, the "Class Members' FLSA-based contract, negligence, and fraud claims are precluded under a theory of obstacle preemption." 508 F.3d at 194. Most important to the court's holding was the "[c]rucial[ ]" fact that "the Class Members' state claims all depended on establishing that [the defendant] violated the FLSA," and that "[w]ithout doubt, these state claims essentially require the same proof as claims asserted under the FLSA itself." *Id.* at 193. The court further stated:

> The Class Members do not contend, however, that any North Carolina law entitles them to unpaid wages. Rather, as discussed above, they rely on the FLSA for their rights, and they invoke state law only as the source of remedies for the alleged FLSA violations. Importantly, the FLSA does not explicitly authorize states to create alternative remedies for FLSA violations.

Id. The court also noted that its holding was "consistent with the rulings of several district courts deeming state claims to be preempted by the FLSA where those claims have merely duplicated FLSA claims." *Id.* at 194 (citing *Choimbol v. Fairfield Resorts, Inc.*, No. 2:05cv463, 2006 WL 2631791, at *4–6 (E.D.Va. Sept. 11, 2006); *Moeck v. Gray Supply*

Corp., No. 03–1950, 2006 WL 42368, at *2 (D.N.J. Jan. 6, 2006); *Chen v. St. Beat Sportswear, Inc.*, 364 F.Supp.2d 269, 292–93 (E.D.N.Y.2005); *Morrow v. Green Tree Servicing, L.L.C.*, 360 F.Supp.2d 1246, 1252–53 (M.D.Ala.2005); *Sorenson v. CHT Corp.*, No. 03 C 1609(L), 2004 WL 442638, at *5–7 (N.D.Ill. Mar. 9, 2004); *Johnston v. Davis Sec., Inc.*, 217 F.Supp.2d 1224, 1227–28 (D.Utah 2002); *Alexander v. Vesta Ins. Group, Inc.*, 147 F.Supp.2d 1223, 1240–41 (N.D.Ala.2001)).

The Ninth Circuit Court of Appeals came to a different conclusion in *Williamson*. In *Williamson*, the court addressed whether plaintiffs' common law fraud claims were preempted by the FLSA. 208 F.3d at 1152–54. The court stated conflict (obstacle) preemption would apply if two conditions were met: "(1) the anti-retaliation provision [in the FLSA] covers [plaintiffs' common law fraud claims] and (2) the FLSA is the exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA." *Id.* at 1152. Regarding the first condition, the court held that the FLSA anti-retaliation provision did not apply to defendant's allegedly fraudulent conduct. *Id.* In other words, plaintiffs' common law fraud claim provided the sole right and remedy for defendants' alleged bad acts. *Id.* Regarding the second condition, the court found the FLSA did not provide exclusive remedies for violating its provisions. The court initially noted that the FLSA's savings clause at 29 U.S.C. § 218(a), which allows states to enact stricter wage, hour, and child labor provisions, "indicates that [the FLSA] does not provide an exclusive remedy." *Williamson*, 208 F.3d at 1151. Then the court distinguished a pair of cases, *Kendall v. City of Chesapeake*, 174 F.3d 437 (4th Cir.1999), and *Lerwill v. Inflight Motion Pictures*, 343 F.Supp. 1027 (N.D.Cal.1972), to at least raise doubt

that the FLSA provides the exclusive remedy for violating its provisions.[7] Both of these cases suggested or stated that the FLSA contained the exclusive remedies for its own violations. *Kendall*, 174 F.3d at 443 ("[I]n the FLSA Congress manifested a desire to exclusively define the private remedies available to redress violations of statute's terms."); *Lerwill*, 343 F.Supp. at 1029 ("The only conclusion possible, then, is that the statutory remedy is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA."). Regarding *Kendall*, the *Williamson* court noted that *Kendall* was not a case about preemption, but about "whether another federal statute (Section 1983) can support a claim that clearly falls under the FLSA." *Williamson*, 208 F.3d at 1153. Regarding *Lerwill*, the Ninth Circuit Court of Appeals noted it was also "dubious authority" because it did not discuss preemption at all, and because "[i]t was about a plaintiff's effort to get a more favorable remedy." *Id.* Thus, in the end, the court found neither of its obstacle preemption conditions satisfied, and therefore held that the FLSA did not preempt plaintiffs' common law fraud claim. *Id.*

Whether this court should ultimately follow the persuasive authority in *Anderson* or *Williamson*—there is no mandatory authority on point—requires the court to review the applicable state law in this case, the IWPCL, in light of the arguments made for and against preemption. The IWPCL is a "remedial

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[7] Interestingly, the *Anderson* court relied on *Kendall* for its holding that the FLSA provided the exclusive remedy for FLSA violations. *Anderson*, 508 F.3d at 194 ("Whether the FLSA provides exclusive remedies for the enforcement of its own provisions is a question that need not occupy us for long, because we already answered it [affirmatively] in *Kendall*.").

statute," and "meant to facilitate the public policy of allowing employees to collect wages owed to them by their employers." *Hornby v. State*, 559 N.W.2d 23, 26 (Iowa 1997). Section 91A.3 gives employees the right to receive their wages. It states, "An employer shall pay all wages due its employees. " Iowa Code § 91A.3. The IWPCL also gives employees the right to receive their "wages due" in "at least monthly, semimonthly, or biweekly installments on regular paydays," *id.*, and provides suspended or terminated employees with the right to receive their "wages earned" by "the next regular payday," *id.* § 91A.4. The FLSA, of course, provides similar rights, like the rights to a minimum wage and overtime pay. 29 U.S.C. §§ 206, 207. A big difference between the FLSA and IWPCL is that the IWPCL is more concerned with when or how wages are paid. See *Runyon v. Kubota Tractor Corp.*, 653 N.W.2d 582, 585 (Iowa 2002) ("We have observed that the purpose of chapter 91A is to 'facilitate collection of wages by employees.' " (quoting *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999))). Nevertheless, both statutes require employers to pay certain wages to their employees. *See Stahl v. Big Lots Stores, Inc.*, No. 06–CV–1026–LRR, 2007 WL 3376707, at *5 (N.D.Iowa Nov. 7, 2007) ("The purpose of the FLSA and the IWPCL is to 'facilitate the collection of wages owed to employees.' " (quoting *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997))). While the FLSA prescribes exactly what kind of wages must be paid, *see* 29 U.S.C. §§ 206, 207, the IWPCL simply requires that an employer "pay all wages due its employees," Iowa Code § 91A.3. Thus, the FLSA may be used to establish an employee's right to a certain amount of wages under the IWPCL and an employer's

violation of the IWPCL for not paying "all wages due its employees." *Id.*

And that appears to be exactly the case here. Plaintiffs complaint alleges that Tyson is obligated to pay all wages to its employees under the IWPCL, but Plaintiffs never state what law or right—other than those rights conferred by the FLSA—they rely on that establishes they are entitled to the wages they seek. In addition, despite Tyson's argument that Plaintiffs' IWPCL claim is based on a violation of the FLSA,[8] Plaintiffs do not assert their right to wages due under the IWPCL is conferred by anything other than the FLSA. In such a case, it is perhaps obvious that Plaintiffs rely on the FLSA to establish a violation under the IWPCL for Tyson's failure to "pay all wages due its employees." *Id.* This is not surprising, as this court has recognized this situation before: The "violation of the FLSA is precisely the basis for the wages purportedly owed under the IWPCL in this case. Thus, the IWPCL claim is essentially 'duplicative' of the FLSA claim in this action." *Bartleson v. Winnebago Indust., Inc.*, 219 F.R.D. 629, 634 (N.D.Iowa 2003) (citations omitted).[9]

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[8] Tyson specifically argues that "the IWPCL does not provide Plaintiffs with any substantive rights, but simply provides a mechanism for plaintiffs to recover wages owed but unpaid," and that "Plaintiffs' claims under the IWPCL must rely on the FLSA to establish the underlying right to compensation allegedly owed by defendant within the meaning of the IWPCL." Dkt. # 45.

[9] A violation of the IWPCL, however, is not always dependent upon establishing a violation of the FLSA. The specific amount of "wages due" to employees under the IWPCL must be provided by something other than the IWPCL. And as a general matter, that amount does not have to be provided by the FLSA. The wages due under the IWPCL could be based on any number of legal bases, such as an employment agreement or Iowa's minimum wage law.

As a result, this case appears similar to the case in *Anderson*. Plaintiff's state law claims in *Anderson* depended on violations of the FLSA, as they do here. 508 F.3d at 193–94. In *Williamson*, however, the plaintiff's common law fraud claim did not depend on any violation of the FLSA—the FLSA did not even provide a basis for recovery for the claim asserted by the plaintiff. 208 F.3d at 1152–53. Nevertheless, the court does not believe such "duplication" means Plaintiffs' IWPCL claim is preempted by their FLSA claim because the court, like the court in *Williamson*, does not believe the FLSA provides the exclusive remedy for its violations. Thus, the court disagrees with the Fourth Circuit Court of Appeals's determination that the FLSA provides otherwise. *Anderson*, 508 F.3d at 194; *see Roman v. Maietta Const., Inc.*, 147 F.3d 71, 76 (1st Cir.1998) ("As the trial court noted, 'the FLSA is the exclusive remedy for enforcement of rights created under the FLSA.' "). As the court in *Williamson* determined, "the 'savings clause' indicates that [the

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See Iowa Code § 91D.1 (requiring a minimum wage of "$7.25 as of January 1, 2008"). Because the IWPCL may rely on a legal basis for wages that is stricter or different than the FLSA, the IWPCL is not generally duplicative of the FLSA. *Cf. Avery v. City of Talladega*, 24 F.3d 1337, 1348 (11th Cir.1994) ("[T]he district court erred in holding that the FLSA pre-empts a state law contractual claim that seeks to recover wages for time that is compensable under the contract though not under the FLSA."). Moreover, the IWPCL could apply in different circumstances than the FLSA, because the FLSA covers employers and employees who are not necessarily covered under the IWPCL. *See Dietrich v. Liberty Square, L.L.C.*, No. C 05–2037–EJM, 2006 WL 1876989, at *1–2 (N.D.Iowa July 6, 2006) (finding that the definitions of employer and employee are different under the FLSA and IWPCL).

FLSA] does not provide an exclusive remedy." 208 F.3d at 1151. The savings clause provides:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week established under this chapter. .

29 U.S.C. § 218(a). Under the savings clause, a state may clearly provide greater benefits, or rights, than the FLSA. While the savings clause does not specifically reference remedies, the court believes the savings clause indicates that Congress did not foreclose states from providing alternative remedies. In addition, while the *Anderson* court focused on the fact that the FLSA does not "explicitly authorize states to create alternative remedies for FLSA violations," 508 F.3d at 193, neither does the FLSA explicitly forbid states from doing so. In light of the savings clause, the court thinks the better conclusion is that the FLSA does not provide the exclusive remedy for violations of its mandates.[10]

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[10] In this case, the remedies available under the IWPCL are almost identical to the remedies available under the FLSA. *See Stahl v. Big Lots Stores, Inc.*, No. 06–CV–1026–LRR, 2007 WL 3376707 (N.D.Iowa Nov. 7, 2007) (comparing the remedies available under the IWPCL and the FLSA). Under the IWPCL, successful plaintiffs may recover "unpaid wages or expenses, court costs and usual and necessary attorney's fees incurred in recovering the unpaid wages or expenses." Iowa Code § 91A.8. In addition, the successful plaintiff under the IWPCL may recover liquidated damages, generally limited to "the amount of unpaid wages," *id.* § 91A.2(6), "[w]hen it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section 91A.3," *id.* § 91A.8.

Moreover, because the FLSA does not provide the exclusive remedy for its violations, the court does not believe Plaintiffs' duplicative IWPCL claim "interferes," "frustrates," "conflicts," or "stands as an obstacle" to the goals of the FLSA. *Forest Park II*, 336 F.3d at 733 (quotations omitted). It may be true that Plaintiffs' IWPCL claim depends on proving an FLSA violation to succeed. But the court does not see how this dependency or duplication means, under an implied/conflict/obstacle preemption analysis, that Plaintiffs' IWPCL claim is preempted by the FLSA. The goal of the FLSA—"to eliminate 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,' " *Anderson*, 508 F.3d at 192 (quoting 29 U.S.C. § 202(a))—is not frustrated by enforcing the IWPCL, *see Forest Park II*, 336 F.3d at 733 (noting a state statute must give way when it frustrates federal law). And the court does not see how enforcement of the IWPCL "interferes with the methods by which the federal statute was designed to reach that goal." *Id.* (quotation omitted). Tyson certainly argues the "method" of FLSA collective action certification is interfered with by the Rule 23 class action procedure for Plaintiffs' IWPCL claim, but the IWPCL itself does not interfere with the

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Under the FLSA, successful plaintiffs may recover "their unpaid minimum wages, or their unpaid overtime compensation and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b); *see id.* (noting also that violations of section 215(a)(3) entitle the employee to equitable relief, including "employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."). In addition, the successful plaintiff under the FLSA may recover a "reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id.*

methods by which the FLSA is implemented.[11] The IWPCL does not interfere with or stand as an obstacle to the FLSA, despite the fact that Plaintiffs' IWPCL claim is duplicative of their FLSA claim. *See Takacs v. A.G. Edwards & Sons, Inc.*, 444 F.Supp.2d 1100, 1117 (S.D.Cal.2006) ("Here, as in *Williamson*, Plaintiffs' fraud claims under [California's Unfair Competition Law] would not contradict any purpose or application of the FLSA, and therefore should stand.").

Of course, the court is aware of the plethora of cases holding that the FLSA preempts duplicative state law claims. *See Anderson*, 508 F.3d at 194 (citing cases); *Woodard v. FedEx Freight East, Inc.*, 250 F.R.D. 178, 189, 2008 WL 471552, at *11 (M.D.Pa.2008) ("[A] conflict exists where, as here, the state wage law claim parallels the FLSA action."); *Lopez v. Flight Servs. & Sys., Inc.*, No. 07–CV–6186 CJS, 2008 WL 203028, at *5, 7 (W.D.N.Y. Jan. 23, 2008) (holding that "Plaintiffs' state common-law claims for fraud, breach of contract, breach of implied covenants of good faith, tortious interference with contract, and unjust enrichment are preempted by the FLSA" because they are duplicative of the FLSA); *Nimmons v. RBC Ins. Holdings (USA), Inc.*, No. 6:07–cv–2637, 2007 WL 4571179, at *2 (D.S.C. Dec. 27, 2007) ("The foregoing authorities compel the conclusion that Plaintiff's state law claims are not viable and should be dismissed as duplicative of the rights and remedies available under the FLSA."); *see also Ellis*, 527 F.Supp.2d at 449 (using a preemption analysis to "assess[ ] the opt-in/opt-out conflict," and although not deciding whether the FLSA preempted plaintiff's state law claims, suggesting it

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[11] This argument, in fact, is not advanced by Tyson as a reason for preemption, but as a reason for denying, dismissing, or limiting Plaintiffs' request for Rule 23 class certification.

would reach such a conclusion). In fact, nearly every court to consider the issue recognizes that state law claims that merely duplicate or depend on the FLSA are preempted by federal law. *See Lopez*, 2008 WL 203028, at *5 ("Moreover, almost without exception, the District Courts that have considered the question [of whether a duplicative state law claim is preempted by the FLSA] have reached the same result [as the Fourth Circuit Court of Appeals in *Anderson*]." (citing *Choimbol*, 2006 WL 2631791, at *5, and *Petras v. Johnson*, No. 92 CIV. 8298(CSH), 1993 WL 228014, at *2, 3 (S.D.N.Y. June 22, 1993))). But there are also plenty of cases holding the FLSA does not *generally* preempt state law claims in a given case. *See Guzman v. VLM, Inc.*, No. 07–CV–1126 (JG)(RER), 2008 WL 597186, at *10 (E.D.N.Y. March 2, 2008) ("[I]t is settled in the Second Circuit that FLSA does not preempt state wage and hour laws."); *Thorpe v. Abbott Labs., Inc.*, 534 F.Supp.2d 1120, 1124 (N.D.Cal.2008) ("[T]he FLSA clearly indicates that it does not preempt stricter state law claims." (citing 29 U.S.C. § 218(a))); *Sjoblom v. Charter Commc'ns, L.L.C.*, No. 3:07–cv–0451–bbc, 2007 WL 4560541, at *5 (W.D.Wis. Dec. 19, 2007) ("[T]he [FLSA] does not preempt Wisconsin wage and hour laws."); *Neary v. Metro. Prop. & Cas. Ins. Co.*, 472 F.Supp.2d 247, 251 (D.Conn.2007) ("[T]he FLSA does not preempt state wage and hour statutes."); *Takacs*, 444 F.Supp.2d at 1116-18 ("The Ninth Circuit has held that the FLSA does not preempt state law overtime wage laws. "); *Dancer I–VII v. Golden Coin, Ltd.*, 176 P.3d 271, 273 (Nev.2008) (per curiam) ("Given that the FLSA expressly provides that higher state minimum wage legislation may control minimum wage claims, and because Nevada's minimum wage law provides greater employee wage protection than that provided

under the FLSA, we conclude that the FLSA does not preempt the NWHL."). Although this case may be a first in holding that the FLSA does not preempt a *duplicative* state law claim, the court believes the better conclusion in this case—where there is no controlling authority on the subject and the court believes the FLSA does not provide the exclusive remedy for its violations—is that the FLSA does not preempt Plaintiffs' duplicative IWPCL claim.[12]

B. Dual Certification

Tyson's second argument against Plaintiffs' IWPCL claim is that the procedural aspects of class certification under Federal Rule of Civil Procedure 23 are so completely at odds with the procedural aspects of collective action certification under 29 U.S.C. § 216(b), that Plaintiffs' IWPCL claim must be denied, dismissed, or limited. Tyson's argument focuses on the differences between the "opt-out" procedure under Rule 23 and the "opt-in" procedure under § 216(b).

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[12] *Osby v. Citigroup, Inc.*, No. 07–cv–06085–NKL, 2008 WL 2074102 (W.D.Mo. May 14, 2008), is the only authority the court can find from the Eighth Circuit that directly tackles the preemption issue. In *Osby*, the district court determined plaintiff's state law claim of unjust enrichment was not preempted by the FLSA because the state law claim did "not depend on establishing that Citigroup violated the FLSA." 2008 WL 2074102, at *2. While the court's holding here is inconsistent with *Osby*—because the state law claim in this case depends on establishing that Tyson violated the FLSA—the court's holding regarding preemption in this case is, as Plaintiffs point out, at least consistent with the *results* of two prior cases in this district that allowed IWPCL and FLSA claims to proceed together, although the question of preemption never arose. *See Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 884–85 (N.D.Iowa 2007) (exercising supplemental jurisdiction over plaintiff's IWPCL claim); *Bartleson*, 219 F.R.D. at 634 (same).

This argument, like Tyson's preemption argument, is particularly popular among district court dockets right now. *See, e.g., Woodard*, at 183–90, 2008 WL 471552, at *6–12. No clear or consistent resolution appears imminent, however,[13] and like the question of preemption, there is no controlling authority for the court to rely on.

Despite their confusing semantic similarities, the differences between class actions and collective actions are great. *See Lugo v. Farmer's Pride Inc.*, 2008 WL 638237, at *2 (E.D.Pa. March 7, 2008) ("Class actions and collective actions can often be confused with each other."); *Salazar*, 527 F.Supp.2d at 877 ("At the outset, it is crucial to note the distinction between a FLSA *collective* action and a Rule 23 *class* action. The distinction is sometimes blurred."). *See generally* Wright, Miller, & Kane, *Federal Practice and Procedure* § 1807 at 468-77 (2005 & Supp.2007) [hereinafter Wright] (stating the differences between Rule 23 class actions and FLSA collective actions). Plaintiffs in class actions certified under Rule 23 are generally a member of the class unless they opt-out.[14]

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[13] The different results obtained in these cases are evident from two recent decisions that were announced on the same day, but with opposite results. *Compare Ellis*, 527 F.Supp.2d at 449–52 (holding the opt-in and opt-out procedures created a conflict that required "Plaintiffs parallel state claims [to] be dismissed"), *with Freeman v. Hoffmann-LaRoche, Inc.*, No. 07–1503(JLL), 2007 WL 4440875, at *2 (D.N.J. Dec. 18, 2007) (denying Defendants' motion "to dismiss or strike Plaintiffs' state law class action allegations solely on the basis of their 'inherent incompatibility' with the asserted FLSA collective action").

[14] Not all class actions under Rule 23 are the same:

> Rule 23(b) authorizes three types of class actions and makes participation in the first two types mandatory for individuals falling within the definition of the class. The

See In re Piper Funds, Inc., 71 F.3d 298, 303–04 (8th Cir.1995) (recognizing plaintiffs have a right to opt out of a Rule 23 class action). Under § 216(b), plaintiffs must opt-in to become a member of the collective action. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

There is no doubt that the opt-in/opt-out distinction represents "a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [the] FLSA." *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir.1975); *see Woodard*, at 187, 2008 WL 471552, at *9 ("Rule 23 is the antithesis of § 216(b)."). Because of this difference many courts have held that Rule 23 class actions may not be maintained in the same action as a FLSA collective action. *See Burkhart-Deal v. Citifinancial, Inc.*, 2008 WL 2357735, at *1–2 (W.D.Pa. June 5, 2008) (concluding "the inherent incompatibility Plaintiff's FLSA claims and state law class claims, in this particular case, require dismissal of the state law class claims"); *Woodard*, at 188, 2008 WL 471552, at *12 (dismissing Plaintiffs' Rule 23 class allegations because "the Court finds that simultaneous prosecution of Mr. Woodard's FLSA collective action and [Pennsylvania Minimum Wage Act claim] class action will frustrate the congressional intent and

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> third type of class action under Rule 23(b)(3) requires individuals falling within the definition of the class to opt out of the litigation if they do not wish to be bound by any judgment that is reached.

Wright, § 1807 at 474. In this case, Plaintiffs request class certification under Rule 23(b)(1) and (3).

circumvent § 216(b)'s opt-in requirement"); *Ellis*, 527 F.Supp.2d at 452 (dismissing plaintiffs' parallel state law claims because "the policies that underlie the FLSA" would be "total[ly] negat[ed] if the Court were to allow Plaintiffs to pursue state law overtime remedies under Rule 23 and FLSA opt-in remedies in the same action"). Still many other courts, however, have allowed both class and collective actions to proceed. *See Osby*, 2008 WL 2074102, at *3 ("District court cases permitting FLSA collective actions to proceed simultaneously with Rule 23 state actions are legion."); *Jackson v. Alpharma Inc.*, 2008 WL 508664, at *4–5 (D.N.J. Feb. 21, 2008) (addressing the incompatibility argument, and concluding "that it is premature to dismiss Plaintiff's state law claims, given that Plaintiff has alleged this Court has independent CAFA jurisdiction over the claims"). In fact, in this district, the court has recognized that "[o]ther district courts have proceeded well beyond the stage of exercising supplemental jurisdiction and have certified both FLSA collective actions and Rule 23 classes involving claims of violations of state wage payment collection laws." *Salazar*, 527 F.Supp.2d at 884–86 (choosing to exercise, at the time, its supplemental jurisdiction to entertain plaintiffs' IWPCL claim and FLSA claim together). Of course, in this case, there is no question of supplemental jurisdiction: Plaintiffs' state law claim under the IWPCL has an independent jurisdictional basis under 28 U.S.C. § 1332(d), or CAFA. The only question now is whether the differences between Rule 23 class action certification and collective action certification under the FLSA require the court to deny, dismiss, or limit Plaintiffs' IWPCL claim and request for class certification.

Although the court is cognizant of the procedural differences between a Rule 23 class action and FLSA collective action, as well as the unique challenges created when such actions are maintained in the same suit, the court does not feel these differences and challenges are a reason to deny, dismiss, or limit Plaintiffs' class action claim, especially when such a claim has an independent jurisdictional basis. Plaintiffs, of course, must still meet the requirements for collective action and class action certification. If they do, the court will then take up the challenges inherent in maintaining both actions in one suit. The inherent challenges, however, are not a basis to deny, dismiss, or limit Plaintiffs' state law claim. *See Salazar*, 527 F.Supp.2d at 886 ("The court is well-equipped to manage a case involving a FLSA collective action and a state-law class action."); *Guzman*, 2008 WL 597186, at *9 ("It is true that there would be some possibility of confusion, but this can be allayed through careful wording of the class notice."). After all, Plaintiffs would still be under the same opt-in/opt-out predicament even if Plaintiffs brought their IWPCL suit in another court or action.[15] Addressing this situation, another district court opined:

> Plaintiff's state law class action claims could proceed separately from the federal action in this court pursuant to the Class Action Fairness Act.

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[15] It should be noted, however, that Plaintiffs have asked for class action certification under both subdivision (b)(1) and (b)(3) of Rule 23. If the court were to certify Plaintiffs' class action under (b)(1), Plaintiffs would not be able to opt-out of the class action because membership is mandatory under either (b)(1) or (b)(2). *See generally* Wright, § 1784.1 at 343–344. Only if the court were to certify Plaintiffs' class action under subdivision (b)(3) would there truly be an opt-in/opt-out situation.

> Although including the federal and state law claims in the same lawsuit will pose challenges, I am not persuaded that separate adjudication of these claims will reduce confusion among potential class members who would still receive two notices concerning almost identical facts: one requiring them to opt in to a federal collective action and another including them in a state law class action unless they opt out. Clearly drafted collective and class action notices should help alleviate confusion in this case.

Sjoblom, 2007 WL 4560541, at *5 (citation omitted).

Tyson also argues the court should not allow both actions to proceed because doing so would have serious legal ramifications for potential plaintiffs who did not opt-in to the FLSA action. In other words, if class members under Rule 23 failed to opt-in to the FLSA collective action, they might subsequently be precluded by principles of res judicata from asserting their federal rights under the FLSA. The court knows of no case that has so held, and the court does not believe this is a serious or valid concern, *see Guzman*, 2008 WL 597186, at *10 n. 11 (rejecting this argument), or that Tyson genuinely shares this concern. Finally, Tyson argues that the court should exercise its discretion and limit the number of class members under Rule 23 to only those that opt-in under the FLSA. This court has done so when addressing concerns of supplemental jurisdiction, *see Bartleson*, 219 F.R.D. at 634–38 (holding that the court's supplemental jurisdiction over plaintiffs' state law claims extended only to those state law class members who also opted in to the FLSA claim), *but see Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 420–425 (holding the opt-in provision of the FLSA did not

expressly prohibit the exercise of supplemental jurisdiction over those state law claimants that did not opt-in), but Plaintiffs IWPCL claims have an independent jurisdictional basis in this case under CAFA. Furthermore, because the court does not find the differences between a class action and a collective action preclude the maintenance of both actions, the court does not believe it is necessary to limit the class action in the manner suggested.

C. Rules Enabling Act

Some of the decisions confronting the issues in this case address an argument against dual certification based on the Rules Enabling Act (REA), 28 U.S.C. § 2072(a). *E.g., Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164, 2008 WL 2201469, at *12 (S.D.N.Y.2008). Such an argument has not been advanced in this case. Thus, the court expresses no opinion on the subject other than to note that there is no controlling authority, and that courts have come to differing conclusions. *Compare Ellis*, 527 F.Supp.2d at 454 (finding, in the alternative under the REA, that plaintiffs duplicative state law claims should be dismissed), *with Osby*, 2008 WL 2074102, at *3-4 (rejecting defendant's argument under the REA); *Sjoblom*, 2007 WL 4560541, at *5 (same); *Freeman*, 2007 WL 4440875, at *3 (same).[16]

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[16] *Ellis* and *Freeman* were announced on December 18, 2007, and *Sjoblom* was announced on December 19, 2007. In *Sjoblom*, the court stated that "the only courts that have addressed the argument that the Rules Enabling Act prevents simultaneous litigation of state and federal class labor claims have squarely rejected it." 2007 WL 4560541, at *5. Since the *Sjoblom* decision was announced a day after *Ellis*, it is not surprising that *Sjoblom* failed to discuss the contrary authority in *Ellis*. However, it appears the court in *Osby* made the same mistake much later,

IV. FLSA COLLECTIVE ACTION

Plaintiffs seek *conditional* certification of their FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b). Plaintiffs request the court to authorize notice to all potential collective action class members. Tyson resists the Plaintiffs' request.

A. Legal Standards

"An employee may bring an FLSA action on behalf of himself and any other 'similarly situated' employees." *Salazar v. Agriprocessors, Inc.* (*Salazar II*), No. 07–CV–1006–LRR, 2008 WL 782803, at *3 (N.D.Iowa March 17, 2008) (quoting 29 U.S.C. § 216(b)). Specifically, the FLSA provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent

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when it was announced on May 14, 2008. *See Osby*, 2008 WL 2074102, at *4 (noting all courts that have addressed the REA argument have rejected it). Contrary to the indications in *Osby* and *Sjoblom*, there is at least one case—*Ellis*—that has found favorably for the defendants on the basis of an REA argument. *See also Damassia*, 250 F.R.D. 164, 2008 WL 2201469, at *12 (addressing and disagreeing with the *Ellis* decision, and noting "[Defendant] relies on a single district court decision from another circuit for the proposition that the Rules Enabling Act prevents the certification of a class for state wage claims related to FLSA wage claims.").

> is filed in the court in which such action is brought.

29 U.S.C. § 216(b). Thus, the FLSA "allows as class members only those who 'opt in.' " *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir.1975). The FLSA provides the district court with "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). The court has a "responsibility to avoid the 'stirring up' of litigation through unwarranted solicitation" of potential opt-in plaintiffs, *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D.Minn.1991), but the district court should, "in appropriate cases," exercise its discretion to facilitate notice to potential plaintiffs, *Hoffmann-La Roche Inc.*, 493 U.S. at 169.

Section 216(b) does not define when "other employees [are] similarly situated" so that collective action certification, and the authorization of notice, is appropriate. 29 U.S.C. § 216(b). Similarly, the Eighth Circuit Court of Appeals has not defined what "similarly situated" means, or elaborated on when it is an "appropriate case[ ]" to facilitate notice. *Salazar II*, 2008 WL 782803, at *3. Courts across the country, however, have discussed various approaches to determine whether plaintiffs are similarly situated.[17]

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[17] The Tenth Circuit Court of Appeals explained three different approaches to collective action certification under § 216(b): (1) a two-step, or "*ad hoc* case-by-case" approach, (2) an approach incorporating the analysis used for class certification under Federal Rule of Civil Procedure 23, and (3) an approach incorporating the analysis used for "spurious" class actions under

The great majority of these courts—including most or all of the district courts within the Eighth Circuit—have championed a two-step approach to determine collective action certification under § 216(b). *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir.2006) (recognizing that the two step approach is "typically used by courts in suits filed under 29 U.S.C. § 216(b)"); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir.2001) ("The two-tiered approach to certification of § 216(b) opt-in classes . . appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it in future cases."); *Resendiz-Ramirez v. P & H Forestry, L.L.C.*, 515 F.Supp.2d 937, 940 (W.D.Ark.2007) ("The Eighth Circuit has not yet declared which approach it favors in deciding whether plaintiffs are similarly situated under 29 U.S.C. § 216(b), but the district courts in this circuit use the two-stage analysis.")

Because the Northern District of Iowa has artfully danced the "two-step" before, *see, e.g., Salazar II*, 2008 WL 782803 at * 3–4, and other circuit courts approve the use of this approach, *see, e.g., Thiessen*, 267 F.3d at 1105 (noting "there is little difference in the various approaches," but that the two-step approach is "[a]rguably the best of the three"), and because neither party in this case has advanced an argument to apply a different approach,[18] the court will follow the two-step approach to determine whether other employees are similarly situated for collective action

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pre–1966 Rule 23. *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir.2001).

[18] However, the parties dispute whether the court should employ a first step or second step analysis at this point in the parties' litigation.

certification under § 216(b), *see Resendiz-Ramirez*, 515 F.Supp.2d at 941 ("The Court is convinced that the more prudent approach is to use the two-stage certification analysis that is used by a majority of courts, including a majority of district courts in the Eighth Circuit."). Nevertheless, the court believes the admonition by the Eleventh Circuit Court of Appeals is important: "Nothing in our circuit precedent, however, requires district courts to utilize this approach. The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court." *Hipp*, 252 F.3d at 1219.

The two-step approach to collective action certification " 'distinguishes between conditional class certification, generally made at the "notice stage," and a final class certification determination made after discovery is largely completed.' " *Dietrich*, 230 F.R.D. at 577 (quoting *Campbell*, 2001 WL 34152094, at *2).

> Applying the two-part test, the Court first uses a lenient standard to determine whether similarly situated persons exist, and if appropriate, the class is conditionally certified. The second step occurs after notice, time for opting-in, and discovery have taken place. Applying a stricter standard, the Court makes a factual determination on the similarly situated question. The second inquiry is usually conducted upon a defendant's motion for decertification.

Freeman v. Wal-Mart Stores, Inc., 256 F.Supp.2d 941, 944 (W.D.Ark.2003) (citation omitted); *see Resendiz-Ramirez*, 515 F.Supp.2d at 940-41 (explaining the two-step approach). Whether during the first step/notice stage or second step/final stage, the burden remains on the plaintiffs to show that "other

employees [are] similarly situated." 29 U.S.C. § 216(b); *see Frank v. Gold'n Plump Poultry, Inc.*, No. 04–CV–1018 (PJS/RLE), 2007 WL 2780504, at *2–3 (D.Minn. Sept. 24, 2007) (recognizing the plaintiffs' burdens at the first and second steps).

At the first step, or notice stage, "[t]o show conditional certification is warranted, the plaintiffs 'need merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist.' " *Salazar II*, 2008 WL 782803 at *5 (quoting *Dietrich v. Liberty Square, L.L.C.*, 230 F.R.D. 574, 577 (N.D.Iowa 2005)). Although the burden at the first step is "more lenient," and does not require existing plaintiffs to "show that members of the conditionally certified class are actually similarly situated," *Fast v. Applebee's Int'l, Inc.*, 243 F.R.D. 360, 363 (W.D.Mo.2007), "plaintiffs must present more than mere allegations; i.e., some evidence to support the allegations is required," *Young v. Cerner Corp.*, 503 F.Supp.2d 1226, 1229 (W.D.Mo.2007). The supporting evidence should include "evidence that other similarly situated individuals desire to opt in to the litigation" because " '[o]thers' interest in joining the litigation is relevant to whether or not to put a defendant employer to the expense and effort of notice to a conditionally certified class of claimants.' " *Parker v. Rowland Express, Inc.*, 492 F.Supp.2d 1159, 1164-65 (D.Minn.2007) (quoting *Simmons v. T–Mobile USA, Inc.*, No. H–06–1820, 2007 WL 210008, at *9 (S.D.Tex. Jan. 24, 2007)). In addition to "whether potential plaintiffs have been identified," district courts outside of the Eighth Circuit have evaluated several other factors at this stage to determine the propriety of conditional certification, including "whether affidavits of potential plaintiffs have been submitted, whether there is evidence of a widespread discriminatory plan,

and whether, as a matter of sound management, a manageable class exists." *Jimenez v. Lakeside Pic-N-Pac, L.L.C.*, 2007 WL 4454295, at *2 (W.D.Mich. Dec. 14, 2007) (citing *Olivo v. GMAC Mortg. Corp.*, 374 F.Supp.2d 545, 548 (E.D.Mich.2004)). In sum, "[c]onditional certification in the first step 'requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan.' " *Young*, 503 F.Supp.2d at 1229 (quoting *Davis v. NovaStar Mortg., Inc.*, 408 F.Supp.2d 811, 815 (W.D.Mo.2005)).

At the second step, or final stage, "[p]laintiffs seeking to maintain an opt-in class action bear the burden to show that they are similarly situated with respect to their job requirements and pay provisions." *Kautsch v. Premier Communications*, No. 06–cv–04035–NKL, 2008 WL 294271, at *2 (W.D.Mo. Jan. 31, 2008) (citing *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir.1996)). This showing is usually required after a collective action has been conditionally certified and upon the defendant's motion to decertify, *Freeman*, 256 F.Supp.2d at 944, or "after the close of discovery, or at least where 'discovery is largely complete and the matter is ready for trial,' " *Huang v. Gateway Hotel Holdings*, 248 F.R.D. 225, 227 (E.D.Mo.2008) (quoting *Hipp*, 252 F.3d at 1218). Although the plaintiff's burden at this final stage is more strict than at the notice stage, the plaintiff need not show that opt in plaintiffs are "identically situated." *Fast*, 243 F.R.D. at 363. The court considers three factors to determine whether plaintiffs remain similarly situated at the final stage. *Smith*, 404 F.Supp.2d 1144, 1150 (D.Minn.2005) (citing *Thiessen*, 267 F.3d at 1103). These factors include: the employment and factual settings of plaintiffs; (2) the various defenses available to

defendants; and (3) considerations of fairness, procedure, and manageability. *Id.*; *Kautsch*, 2008 WL 294271, at *2. The district court must assess these factors in light of "the fundamental purpose of 29 U.S.C. § 216(b): (1) to lower costs to the plaintiffs through the pooling of resources; and (2) to limit the controversy to one proceeding which efficiently resolves 'common issues of law and fact that arose from the same alleged activity.' " *Kautsch*, 2008 WL 294271, at *2 (quoting *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D.Pa.2000)).

Thus, in sum, the level of proof required at each stage in the FLSA collective action certification process is largely dependent upon the amount of information before the court. At the first step, when less information is before the court, plaintiffs simply need to come forward with a "factual basis," *Dietrich*, 230 F.R.D. at 577, a "colorable basis," *Smith*, 404 F.Supp.2d at 1149, or "substantial allegations," that the existing plaintiffs and putative plaintiffs "were together the victims of a single decision, policy or plan," *Davis*, 408 F.Supp.2d at 815. At the second step, the court has much more information and is in a position to "make a factual determination on the similarly situated question," *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir.1995), and therefore "plaintiffs must clear a higher hurdle to continue," *Frank*, 2007 WL 2780504, at *3. The "stricter post-discovery standard" requires plaintiffs to convince the court that the factual record reveals putative plaintiffs are still similarly situated to existing plaintiffs. *Smith*, 404 F.Supp.2d at 1149. Finally, and importantly, whether at the first or second step in the § 216(b) collective action certification process, plaintiffs need not prove the merits of their claim. That is, plaintiffs do not have to show that the employer actually

violated the FLSA.[19] *See Smith v. Heartland Automotive Servs., Inc.*, 404 F.Supp.2d 1144, 1148

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[19] Plaintiffs specifically argue this point in their brief, although they fail to cite to any case law to support their argument:

> In order to prevail in requesting this Court to conditionally certify this matter as a collective action, Plaintiffs do not have to prove on the merits that Tyson's 'gang time' is *per se* illegal (though they could easily do so even at this early stage of the litigation). Plaintiffs only have to prove that they are 'similarly situated' because they are each affected by a common Tyson policy which they are challenging. Thus, while Tyson may dispute the Plaintiffs' claims that Tyson's 'gang time' system is illegal under the [FLSA], Tyson cannot dispute that its uniform 'gang time' pay practices which affect almost all of its hourly employees render this matter suitable for collective action treatment pursuant to the [FLSA].

Dkt. # 59, Pt. 2. Defendant's counter-argument suggests Plaintiffs must prove the merits of their claim at the certification stage: Tyson argues Plaintiffs cannot show that they are similarly situated to potential plaintiffs because plaintiffs "fail to present any evidence of an *unlawful* policy or practice that is common to *all* Storm Lake employees." Dkt. # 49 (emphasis in original). However, Tyson also argues that "[P]laintiffs must demonstrate . . . some similarity binding the named plaintiffs and putative class members as the victims of a particular *alleged* unlawful policy or practice." Dkt. # 49 (emphasis added). Although some district courts in the Eighth Circuit appear to require proof on the merits at the certification stage, *see, e.g.*, *Dietrich*, 230 F.R.D. at 577 (" 'Courts have held that plaintiffs *can meet this burden by* making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan *that violated the law*.' " (emphasis added) (quoting *Hoffman v. Sbarro, Inc.*, 1997 WL 736703 (S.D.N.Y.1997))), the court does not believe plaintiffs have to make such a showing. Instead, the court believes the better policy at the certification stage is simply to determine whether "a class of similarly situated plaintiffs exists." *Smith*, 404 F.Supp.2d at 1149. Of course, it would be unreasonable to proceed with certification if a plaintiff's claim was meritless or

(D.Minn.2005) ("[T]he Court does not consider the merits of Plaintiffs' claims on a decertification motion. "); *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 680 (D.Colo.1997) ("[W]hether plaintiffs can meet their burden in the liability phase is irrelevant to the question of § 216(b) certification.").

B. Legal Analysis

1. First or second step?

Both parties urge the application of the two-step approach to determine collective action certification, but the parties dispute which step should be undertaken at this time. Plaintiffs argue the court should base its analysis under standards of the first step, or the "notice stage," because Plaintiffs seek conditional certification at this point and, although some discovery has taken place, the record is "woefully inadequate" to make a final decision. Dkt. # 59. Tyson argues the court should skip the first step and base its analysis under the standards of the second step, or "final stage," "because considerable discovery has occurred and an ample factual record has been established." Dkt. # 49.

The parties have completed class discovery. Tyson deposed the six named remaining plaintiffs and twelve potential opt-in plaintiffs, and Plaintiffs deposed four Rule 30(b)(6) witnesses provided by Tyson. Tyson has

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completely deficient, and the court would exercise its discretion to prohibit the § 216(b) certification of plaintiffs in such a case. But it is similarly unreasonable to require actual proof on the merits of plaintiffs' claims at the certification stage, as that is what trial is for. The question at the certification stage, whether during the first step or second step, is whether plaintiffs are similarly situated—not whether plaintiffs can succeed on their claim.

also responded to twelve interrogatories, produced almost 3,000 pages of responsive documents, and provided payroll data from February 2004 through March 2007. In addition, over thirty employees submitted "declarations" on behalf of Tyson. Because of this limited, but substantial discovery, it is clear to the court that this case is not at a typical "notice stage." *See Parker*, 492 F.Supp.2d at 1163 ("At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members."). Thus, the court finds support for Tyson's argument that a more demanding standard should be required of Plaintiffs at this point. *See Campbell*, 2001 WL 34152094, at *2 (finding merit in defendant's contention "that the record in this case is beyond that which would warrant the leniency generally given to cases at the notice stage" because the action was "filed nearly a year and a half ago" and "[d]epositions of nearly all named plaintiffs have been taken, Defendants have responded to two sets of interrogatories, and affidavits in support and opposition to the current motion have been filed"); *Smith v. T-Mobile USA, Inc.*, No. CV 05–5274 ABC (SSx), 2007 WL 2385131, at *4 (C.D.Cal. Aug. 15, 2007) ("Where substantial discovery has been completed, some Courts have skipped the first-step analysis and proceeded directly to the second step.").

However, it is also clear that not all information is before the court, and that Plaintiffs are merely requesting *conditional* certification at this time, for the first time. *See Parker*, 492 F.Supp.2d at 1164 ("Here, Plaintiffs seek an Order conditionally certifying this case as a collective action, in order to notify all potential plaintiffs of the pendency of

this lawsuit and to provide them with the opportunity to opt in. Hence, the Court is at the first stage of the two-stage process."). The court is persuaded by the sentiments of other district courts that

> "beginning with tier one of the analysis is the most equitable means of proceeding. [S]hould the court bypass tier one entirely, some potential plaintiffs might not become aware of the lawsuit and would not have an opportunity to join the suit. The potential prejudice to plaintiffs of bypassing tier one thus is significant."

Gieseke v. First Horizon Home Loan Corp., 408 F.Supp.2d 1164, 1167 (D.Kan.2006) (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 468 (N.D.Cal.2004)). Therefore, the court does not believe a second stage—i.e., final stage—analysis is prudent at this point in the proceedings. Instead, the court believes the two step process should begin with the first step in this case.

This conclusion, however, is procedural. The two step approach to collective action certification under § 216(b) has both procedural and substantive aspects. Procedurally, the two step approach allows a district court to *conditionally* certify a collective action among similarly situated plaintiffs, and then revise the certified collective action class later if necessary. Substantively, the two step approach allows a district court to first rely on "substantive allegations" when conditionally certifying a collective action, and then later make a factual determination about the propriety of the certified collective action class. While the court finds the procedural aspect of the two-step approach necessary in this case, it cannot overlook the almost six months of substantial class discovery that the parties have conducted and the valuable

information before the court that is relevant to the certification of Plaintiffs' collective action under the FLSA. *See* Dkt. # 23. As a result, the court will apply what it believes is a common sense application of the two step approach in this case: The court will determine whether *conditional* certification of a collective action is appropriate by evaluating all the facts that have thus far been placed before it. Thus, procedurally, the court is not making any final decisions, and Tyson will have an opportunity to later decertify the class if the court approves conditional certification and authorizes notice. Furthermore, substantively, the court will ultimately use the more onerous second stage analysis to account for all the important facts learned through discovery that inform what putative plaintiffs, if any, are similarly situated to existing plaintiffs. Many other courts have done likewise, although not specifically recognizing the procedural/substantive difference. *See Villanueva-Bazaldua v. TruGreen Ltd. Partners*, 479 F.Supp.2d 411, 415 (D.Del.2007) ("District courts in other circuits have adopted an intermediate approach to the 'similarly situated' inquiry when the parties voluntarily engage in discovery prior to a decision on conditional certification."); *Jimenez*, 2007 WL 4454295, at *3 (stating, because the parties had engaged in six months of pre-certification discovery, that "the Court will review Plaintiffs' allegations and affidavits in conjunction with the evidence gleaned through discovery"); *Thiessen v. General Electric Capital Corp.*, 996 F.Supp. 1071, 1080 (D.Kan.1998) ("Thus, the court adopts an 'intermediate approach' in analyzing the 'similarly situated' issue.").

2. Conditional certification

Plaintiffs request the court to conditionally certify and to approve notice to all potential collective action class members, which Plaintiffs define as:

> All current and former hourly production and support employees of Tyson Foods, Inc., or Tyson Fresh Meats, Inc.'s Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004 to the present.

Dkt. # 34, Exhibit A. Plaintiffs indicate February 7, 2004, because the complaint was filed on February 6, 2007, and the FLSA provides a maximum three year statute of limitations. *See* 29 U.S.C. § 255 (providing a three year statute of limitations for willful violations). Plaintiffs also indicate Tyson's Storm Lake facility because the parties voluntarily agreed to dismiss Plaintiffs' claims against Tyson's Denison facility. Dkt. # 40. In their reply brief, Plaintiffs refine their proposed collective action class: "To be clear, Plaintiffs would define the certified collective action 'class' as including all hourly employees who: (1) don, doff, wash or sanitize *any* sanitary and protective clothing, equipment, and gear; and/or (2) maintain knives, steels and any other tools or equipment that are used in the production process." Dkt. # 59.

Of course, Plaintiffs' defined collective action class must also be considered in light of Plaintiffs' allegations in their FLSA claim. Plaintiffs allege that Tyson violated the FLSA by failing to pay its hourly employees in full. Specifically, Plaintiffs state that Tyson uses an "unlawful compensation system," known as "gang time" or "line time," that fails to compensate

> employees for all required pre-production line and post-production line activities that are necessary and integral to their overall employment responsibilities, such as: donning and doffing clothing and protective equipment, cleaning and sanitizing that equipment, walking to their lockers and/or production line after already performing compensable activities, and at the end of the work day, walking to the wash stations and then to their lockers and/or supply rooms before the end of compensable time, working on knife maintenance equipment known as "steels" or "mousetraps," and waiting in line to receive required knives, supplies, tools and equipment needed for production line activities.

Dkt. # 2. Plaintiffs recognize that their complaint "alleges that this 'gang time' system violates federal law," but Plaintiffs argue all hourly employees—even those not paid by gang time—"are still similarly situated to all other class members because they are likewise not paid in full." Dkt. # 34. The question for the court now is whether these allegations and the factual record support the conditional certification of Plaintiffs' defined collective action class.

a. Substantive analysis under the first step

Although the court believes a more demanding analysis is required in this case due to the amount of discovery conducted, the court begins its discussion with a brief analysis of the relevant considerations under the first step. The court believes these considerations support Plaintiffs' request for conditional certification.

Over 300 employees have filed "consents" to opt in to this lawsuit. Therefore, the court easily finds

"evidence that other similarly situated individuals desire to opt in to the litigation." *Parker*, 492 F.Supp.2d at 1164. This supports Plaintiffs' claim for conditional certification. *Id.* The "consents" are also similar to "affidavits" in support of Plaintiffs' claim, and many potential plaintiffs have been deposed. This also supports Plaintiffs' claim for conditional certification. *Olivo*, 374 F.Supp.2d at 548. Furthermore, there is ample evidence of a "single decision, policy or plan" inasmuch as most production employees are paid on a gang time basis. *Davis*, 408 F.Supp.2d at 815. This is another factor that supports conditional certification. Finally, the court finds support for a manageable collective action class because all potential plaintiffs worked or currently work at the same place—Tyson's pork processing plant in Storm Lake, Iowa. The parties acknowledge that the potential collective action class is over 3,000 members, and while this potential class is not insignificant in number, the potential class is not too large or geographically displaced to be considered unmanageable. *See Owens v. Southern Hens, Inc.*, 2008 WL 723923, at *3 (S.D.Miss.2008) (noting all potential plaintiffs "are all employees at a single facility"); *Freeman*, 256 F.Supp.2d at 945 (refusing to permit notice to employees at every Wal-Mart store in the country); *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 413 (D.Or.2002) (noting "dissimilarities among the putative class members extend to geography, work sites, and payment systems"). Altogether, the court believes these considerations indicate a "factual basis" that similarly situated plaintiffs exist. *See Dietrich v. Liberty Square, L.L.C.*, 230 F.R.D. 574, 577 (N.D.Iowa 2005).

b. Substantive analysis under the second step

Although the first step analysis generally informs the court that conditional certification is appropriate, the court will not conditionally certify Plaintiffs' collective action class without meeting the more demanding standards under the second step. Thus, the court proceeds by analyzing the relevant factors under the second step.

i. Employment and factual settings of plaintiffs. The six named plaintiffs in this case are all employed, or were employed, in the Kill, Cut, and Retrim Departments at Tyson's Storm Lake, Iowa, facility. Like most employed in the Kill, Cut, and Retrim departments, and like most production employees at Tyson's Storm Lake, Iowa, facility, the named plaintiffs are or were paid on a gang time basis. In fact, of the 1,596 hourly employees currently working at Tyson's Storm Lake, Iowa, facility, only 172 employees work in departments that are specifically not paid on a gang time basis. These 172 employees represent the 50 employees in the Load Out department, the 22 employees in the Rendering department, and the 100 employees in the Maintenance department. The remaining hourly employees work in the Kill, Cut, and Retrim departments, and these departments are mostly paid on a gang time basis. Tyson has put forth evidence to show that "some" employees in the Kill, Cut, and Retrim departments are, in fact, paid on a non-gang time basis due to special circumstances such as when the employee regularly performs set up and tear down duties before and after gang time. For example, Curtis Muckey, the Processing Supervisor in the Kill department for the A shift, declared that out of the more than one-hundred employees he supervises, about ten team members arrive early and

stay late to perform set up and clean up activities. [D. ex. 24]. These employees, even though members of the Kill department, are not paid via gang time but based on the time they clock in and out. There is no doubt, however, that most hourly employees at Tyson, like the named plaintiffs, are paid on a gang time basis.[20]

There is also no doubt that nearly all production employees at Tyson's Storm Lake, Iowa, facility wear some kind of PPE. In fact, out of all the evidence presented to the court, the court can only find one instance in which an employee—a "Stunner" in the Kill Department—is not required to wear some kind of PPE. [D. ex. 11]. But the evidence shows that even Stunners usually choose to wear cotton gloves. [D. ex. 11]. The evidence also shows that all other employees are required to wear multiple kinds of PPE, usually consisting of a hard hat, hairnet, hearing protection, a frock, and some kind of boots.[21] It is also evident,

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[20] Plaintiffs allege Tyson employs almost ninety percent of its employees on a gang time basis. This percentage, however, is derived from the approximate 1600 hourly employees and the 172 employees that work in the departments that are specifically not paid via gang time ((1600–172) / 1600 = 89.25%). Thus, it does not account for "some" employees in the Kill, Cut, and Retrim departments that are not paid via gang time. It is obvious, however, that the number of employees paid via gang time is certainly above 75%.

[21] For example, the declarations of supervisory personnel at Tyson's Storm Lake, Iowa, facility show that Tyson employees are generally required to wear some kind of PPE. Bill Haukap, Processing Supervisor in the Cut Department for the A shift, declared that all his team members were required to wear a hard hat, hairnet, beard net (if necessary), hearing protection, and a frock. [D. ex. 3]. Rich Devilbiss, General Supervisor in the Materials Handling/Load Out Department for the B shift, declared that his team members are required to wear a hardhat, hearing protection, and steel-toed boots. [D. ex. 4]. Lonnie Woock,

however, that despite the general need for employees to wear PPE for their work, exactly what kind of PPE is required differs greatly among employees. In fact, the declarations of supervisory personnel indicate that "[t]he clothing and equipment that team members wear differs from department to department and

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General Supervisor in the Rendering Department for the A shift, declared that rendering employees are required to wear a hardhat, hearing protection, and steel-toed boots. [D. ex. 6]. Paul Davis, Maintenance Superintendent for the B shift, declared that maintenance team members are required to wear a hardhat, hearing protection, eye protection, and steel-toed boots. [D. ex. 7]. Moises Gracia, Supervisor in the Retrim Department for the A shift, declared that everyone in the departments he supervises must wear a hard hat, ear protection, hairnet, beardnet (if necessary), frock and rubber boots. [D. ex. 8]. Dan Lindgren, Processing Supervisor in the Cut Department for the B shift, declared that his team members must all wear a hard hat, hairnet, beardnet (if necessary), and hearing protection. [D. ex. 9]. Lori Molan, Supervisor in the Retrim Floor for the B shift, declared that all her employees have to at least wear a hard hat, frock, and hearing protection. [D. ex. 10]. Ron Peters, Supervisor in the Kill Floor for the A shift, declared that everyone must wear the company issued white shirt and pants. [D. ex. 11]. Curt Anderson, Plant Superintendent in the Cut and Retrim Departments for the A shift, declared that all team members must wear frocks. [D. ex. 12]. Randy Story, Supervisor in the Kill Floor for the B shift, declared Kill Floor employees must all wear at least a hard hat, whites (pants and shirt), hairnet, hearing protection, and steel-toed boots. [D. ex. 14]. Curtis Muckey, Processing Supervisor in the Kill department for the A shift, declared that all of his one-hundred or so employees must wear a hard hat, hairnet, beardnet (if necessary), whites, and hearing protection. [D. ex. 24]. Matt Meyer, Supervisor in the Cut Department for the B shift, declared that all of his employees are required to wear some kind of PPE, usually at least a frock. [D. ex. 39]. Finally, Rick Petersen and Kris Jimenes, General Supervisors in the Cut Department, generally declared that all employees are required to wear some sort of PPE, as they frequently see employees don and doff their PPE. [D. ex. 46, 51].

position to position." [D. ex. 3–4, 6–14, 24]. Finally, most employees use knives in their work. William Sager, Tyson's Human Resources Manager in Storm Lake, estimated about seventy percent of Tyson's employees use knives, and that knife use is mostly confined to the Kill, Cut, and Retrim departments. [D. ex. 5]. Those employees with knives typically have additional PPE that must be worn, and additional procedures to follow to clean or sharpen their knives.

This summary of the factual circumstances concerning the putative collective action class makes it clear that there are some very big factual differences among hourly employees at Tyson. The putative collective action class may be all employed at the same facility, but they are spread across six different departments that have their own specific duties and supervisors. Moreover, the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different. Thus, at least with respect to Plaintiffs' defined collective action class, the court does not believe the factual settings of potential plaintiffs support a finding that they are similarly situated.

However, there is a "tie that binds" most all putative plaintiffs together: the gang time compensation system. The putative plaintiffs that are paid via a gang time system are generally similarly situated. They all work in the same location and they are paid by the same general compensation system. Moreover, all of these employees are employed in the Kill, Cut, and Retrim departments, and most all use some kind of knife and wear multiple kinds of PPE. Thus, the court believes the employment and factual settings of plaintiffs support collective action certification if the collective action class is limited to those paid under a

gang time compensation system. *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. 298, (D.Md.2007) (stating a court should inquire, under the first factor, into "whether Plaintiffs have provided evidence of a company-wide policy which may violate the FLSA, as well as an assessment of Plaintiffs' job duties, geographic location, supervision, and salary." (citing *Thiessen*, 996 F.Supp. at 1081–82)).

ii. Defenses available to Tyson. Tyson also argues that the disparate facts among employees give rise to individualized defenses that render collective action treatment improper. Specifically, Tyson argues an individualized inquiry is necessary because the court will have to (1) determine which pre-shift and post-shift activities, if any, constitute "work" within the meaning of the FLSA, (2) determine whether individual supervisors knew that employees were performing off-the-clock "work" activities, (3) determine whether any "work" activities are excluded by the Portal to Portal Act because they are not "integral and dispensable," (4) determine whether any compensable work activities are *de minimus,* and (5) determine whether the statute of limitations applies to a particular collective action class member's claim. Dkt. # 49. Plaintiffs respond by arguing that these alleged defenses do not require individualized treatment and are not applicable in this case.

The court does not agree with Plaintiffs that these questions are inapplicable in this case. It is very likely that these questions will be addressed. For example, whether the donning and doffing of PPE is considered work under the FLSA, whether such work is integral and dispensable, and whether any compensable work is *de minimus* are questions often raised in similar cases. *See, e.g., Alvarez v. IBP*, 339 F.3d 894, 902-04

(9th Cir.2003) ("Accordingly, donning and doffing of all protective gear is integral and indispensable to 'the principal activities for which [the plaintiffs] are employed,' and generally compensable [as work under the FLSA]. However, the specific tasks of donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimus*." (citation omitted)). The court agrees with Plaintiffs, however, that these questions highlighting Tyson's possible defenses do not disfavor conditional certification because these possible defenses are not as individualized as Tyson wants the court to believe. Tyson's argument that there are individualized defenses is premised on its belief that there are numerous factual disparities among putative plaintiffs. Tyson is correct if the putative collective action class is defined as all hourly employees. But as the court found above, when the putative plaintiffs are limited to those that are paid via a gang time system, there are far more factual similarities than dissimilarities. Moreover, the courts that often address these supposed individualized defenses often do so after collective action certification is granted, such as on summary judgment or on appeal. *See De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 364–65 (3d Cir.2007) (determining these questions on appeal from a denial of summary judgment and after collective action certification was approved). Thus, the court is not persuaded that this factor supports Tyson's argument for individual, rather than collective, treatment in this case, so long as the collective action class is limited to those that are paid via a gang time system.

iii. Fairness, manageability, and procedural considerations. Tyson argues it is unfair to certify Plaintiffs' proposed collective action class because

Tyson would be forced to defend against *un* common evidence. Tyson points to the fact that none of the six named plaintiffs work in the Rendering, Materials Handling, or Maintenance departments, and that all six named plaintiffs admitted they could not testify as to the PPE worn by other departmental employees, the methods used to compensate other departmental employees, or how long others in their production areas spend donning and doffing their PPE. Without common evidence to defend against, Tyson argues it is an unfair burden to certify the collective action against it. Plaintiffs do not specifically rebut this argument.

The court again agrees with Tyson that, concerning all hourly employees that don and doff PPE or maintain knives and steels and other tools in the production process, it would be unfair to Tyson to have to defend against all the dissimilarities among these hourly employees. But again, if the collective action class is limited to those paid via a gang time system, the similarities outweigh the dissimilarities, and a fair playing field is created. The collective action class is also manageable for the court, and the court sees no procedural considerations that weigh against the certification of a collective action class that is limited to hourly employees paid via a gang time system.

C. Conditionally Certified Collective Action Class

The court finds the potential plaintiffs are not similarly situated regarding Plaintiffs' originally defined collective action class. Plaintiffs' attempt to persuade the court that all hourly employees are similarly situated fails because a blatant and significant difference exists between the named plaintiffs and some of those they wish to include in the collective action class. That difference is that not all hourly employees are paid via a gang time system. *See*

Kautsch, 2008 WL 294271, at *2 ("Plaintiffs seeking to maintain an opt-in class action bear the burden to show that they are similarly situated with respect to their job requirements and pay provisions.").

The court does believe, however, that potential plaintiffs are similarly situated if the collective action class is limited to only those production employees that are paid via gang time. Gang time, after all, is the company-wide policy that Plaintiffs claim violates the FLSA. Moreover, Plaintiffs acknowledged in their brief a significant amount of employees are not paid via gang time, and that the court could limit the collective action class to only those that are paid via gang time. The court also believes this resolution properly takes into account the "fundamental purpose" of the FLSA by lowering the costs to plaintiffs and efficiently resolving the issues in one proceeding. *Id.* Furthermore, it is well within the court's discretion to refine Plaintiffs' proposed collective action class in this manner. *See Baldridge v. Sbc Comm'ns, Inc.*, 404 F.3d 930, 931–32 (5th Cir.2005) ("[T]he class certification order here is subject to revision before the district court addresses the merits. As we have noted, the court has already used its discretion to modify the original certification order to limit the scope of the class and has scheduled a date to consider decertification before trial begins." (footnote omitted)). Finally, due to the fact that the court is proceeding *procedurally* under the first step of collective action certification, this court's decision simply *conditionally* certifies the redefined collective action class. Thus, Tyson has every opportunity to move to decertify or further limit the class in the future. *See Rawls*, 244 F.R.D. at 299 (addressing defendant's motion to decertify conditionally certified class).

In coming to this conclusion, the court distinguishes the facts in the unpublished decision, *Fox v. Tyson Foods, Inc.*, No. 4:99–CV–1612–VEH (N.D.Ala. Nov. 15, 2006), submitted to the court as Defense exhibit 1. Dkt. # s 45, 49. In *Fox*, the district court denied FLSA class certification to plaintiffs from eight different Tyson chicken processing facilities located in seven different states. [D. ex. 1, p. 1]. In denying FLSA collective action certification, the court noted the "inter-plant and intra-plant inconsistencies" between the plaintiffs, and that the evidence showed "Tyson does not have a single plan to not compensate employees for donning and doffing time." [D. ex. 1, p. 13–14]. In this case, there is only one Tyson facility involved, and all named plaintiffs are paid via gang time. Gang time, of course, is a uniform compensation plan. In addition, to the extent that *Fox* suggests the court needs to determine the merits of Plaintiffs claim in the instant case, the court strongly disagrees with any such proposition.

In the end, the court grants Plaintiffs' motion for the conditional certification of the following collective action class:

> All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004, to the present, and who are or were paid under a "gang time" compensation system in the Kill, Cut, or Retrim departments.

The court does not believe it is necessary to include anything in the collective action class definition about donning and doffing, PPE, or knives and other equipment, because the evidence reveals that those employed in the Kill, Cut, and Retrim departments all don and doff some sort of PPE and/or use some kind of

knife or tool. The court is satisfied this redefined collective action class is similarly situated under the FLSA. The notice and specific orders regarding the conditional certification of Plaintiffs' collective action under the FLSA are set forth in the conclusion and order of this opinion.

V. IWPCL CLASS ACTION

Plaintiffs also seek class certification of their IWPCL claim pursuant to Federal Rule of Civil Procedure 23. Plaintiffs specifically seek certification of a class defined as follows:

> All current and former hourly production and support workers of Defendant Tyson's Storm Lake, Iowa, meat processing facility who have been employed by Tyson at any time from February 7, 2005, to the present.

Dkt. # 35. The date is the only material difference between the Plaintiffs' requested Rule 23 class and their requested FLSA collective action class. Plaintiffs chose February 7, *2005*, as the pertinent date for their Rule 23 class action because the IWPCL provides for a two-year statute of limitations. *See Waterman v. Nashua–Plainfield Cmty. School Dist.*, 446 F.Supp.2d 1018, 1027 (N.D.Iowa 2006) ("The statute of limitations for an IWPCL action is two years from the time the action accrues." (citing Iowa Code § 614.1(8))).

The requirements for certification under Rule 23 are set forth by the rule, which was recently amended[22] to read as follows:

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[22] Rule 23 was amended last year, but only to reflect a general restyling of the rules. Thus, although the parties briefed these

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally

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issues under the old language of the rule, it does not change the import of their arguments.

> to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

FED.R.CIV.P. 23. "To be certified as a class, plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b)." *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1119 (8th Cir.2005). "[T]he court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 are satisfied." *Elizabeth M. v. Montene*[illegible] 458 F.3d 779, 784 (8th Cir.2006) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). "Though class certification is not the time to address the merits of the parties' claims and defenses, the 'rigorous

analysis' under Rule 23 must involve consideration of what the parties must prove." *Elizabeth M.*, 458 F.3d at 786.

A. Rule 23(a) Legal Standards And Analysis

There are four "threshold requirements" under Rule 23(a) that plaintiffs must meet to be certified as a class. *Owner–Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1011 (8th Cir.2003). These requirements include:

> (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. (citing FED.R.CIV.P. 23(a)). The United States Supreme Court has summarized these four requirements as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Tyson concedes Plaintiffs meet the numerosity requirement, but Tyson argues Plaintiffs fail to meet the remaining three elements. The Supreme Court has recognized that these three remaining requirements all "tend to merge," but this court will first address each of them separately. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

1. Commonality

Commonality, as a threshold element for Rule 23 class certification, "requires that there be common

questions of law or fact among the members of the class," but it "does not require that every question of law or fact be common to every member of the class." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir.1982). Instead, commonality may be satisfied "when the legal question linking the class members is substantially related to the resolution of the litigation." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir.1995) (quotations omitted). "Thus, factual differences are not fatal to maintenance of the class action if common questions of law exist." *Robinson v. Sears, Roebuck & Co.*, 111 F.Supp.2d 1101, 1120 (E.D.Ark.2000).

Plaintiffs claim they meet this commonality requirement because they all share the common question of "whether Defendant Tyson has violated [the IWPCL] by not paying production workers at its Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time,' particularly the time spent donning, doffing, and cleaning personal protective equipment." Dkt. # 35. Tyson argues there "is no single question of law or fact that is common to every member of the putative class" because "there is nothing 'uniform' about the pay practices at the Storm Lake facility." Dkt. # 45.

Tyson's argument is largely correct regarding the entire class Plaintiffs defined—all hourly production and support workers. There is no uniform pay practice regarding all hourly production and support workers. However, and as the court found when analyzing the propriety of FLSA collective action certification, there undoubtedly is a uniform pay practice among *most* employees at Tyson's Storm Lake facility. Tyson admits that "it has utilized the same compensation system at all times relevant to the Complaint," and

"that most of the hourly production workers" at its Storm Lake facility "are paid on 'gang time,' plus four minutes a day for pre- and post-shift activities." Dkt. # 15. In fact, as the court found in its FLSA collective action analysis, over 75% of Tyson's nearly 1,600 employees are paid via gang time.

Because Plaintiffs have alleged violations of the IWPCL based on Tyson's alleged "unlawful compensation system," which Plaintiffs define as the use of "gang time," Dkt. # 2, the commonality element cannot be met with regard to those employees who are not paid via gang time. The factual difference between the payment system for employees paid on gang time and the employees not paid on gang time is significant and cannot be ignored. After all, Plaintiffs plainly note the gang time payment system as the basis for their lawsuit, Dkt. # 2, and Plaintiffs assert they meet the commonality requirement for class certification by stating all plaintiffs share the common question of "whether Defendant Tyson has violated [the IWPCL] by not paying production workers at its Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time,' " Dkt. # 35. Certain employees in the requested class, however, are not paid under gang time. Therefore, there is not commonality between the class representatives, who are all workers in the departments paid via gang time, and the requested class members who are not paid via gang time.

But the commonality element is satisfied with respect to most of the class members, i.e., those class members that are paid on a gang time basis. Plaintiffs, of course, allege that such a practice violates the IWPCL, and, thus, there is a common question of law specific to all of the employees paid on a gang time

basis. Tyson points to numerous factual differences regarding the clothing and equipment employees wear, even among those paid on a gang time basis, but the court is not convinced these factual differences defeat commonality among all employees paid on a gang time basis. All employees paid on a gang time basis wear some sort of PPE, and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE. In addition, most all use some kind of knife, and also a scabbard or steel. The small factual differences between those employees that are paid on a gang time basis "are not fatal to maintenance of the class action [because a] common question[ ] of law exist[s]." *Robinson*, 111 F.Supp.2d at 1120. That question is whether Tyson's gang time compensation system violates the law. Because "[a]ll current and former hourly production and support workers" are not all paid via gang time, Plaintiffs' requested class does not meet the commonality requirement under Rule 23(a)(2). But the court is satisfied that the proposed class, if redefined and confined to hourly employees paid under Tyson's gang time compensation system, meets the commonality requirement. *See Felix De Asencio v. Tyson Foods, Inc.*, No. CIV.A 00–CV–4294, 2002 WL 1585580, at *2 (E.D.Pa. July 17, 2002) ("Here, the common questions of law and fact revolve around the allegations that Tyson has violated the WPCL by not paying the New Holland facility production workers for all work performed prior and subsequent to 'line time,' particularly the time spent donning, doffing, and cleaning protective equipment and garments."), *rev'd on other grounds*, *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir.2003).

2. Typicality

"The burden of showing typicality is not an onerous one." *Paxton*, 688 F.2d at 561. In fact, the analysis of typicality tends to merge with the analysis of commonality, *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), although the Eighth Circuit Court of Appeals has "given typicality 'an independent meaning' by holding that Rule 23(a)(3) 'requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff.' " *Paxton*, 688 F.2d at 561 (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.1977)). Typicality "is generally considered to be satisfied 'if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.' " *Id.* at 561–62 (quoting Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1764 at n. 21.1 (Supp.1982)). However, "[t]he presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M.*, 458 F.3d at 787.

Tyson again argues there are "wide factual variations" between the named plaintiffs and putative plaintiffs that preclude a finding of typicality. The court agrees with respect to Plaintiffs' proposed class definition. All hourly employees are not typical of each other because some are not paid via a gang time compensation system. However, if the class is confined to employees paid via gang time, the typicality requirement is met because their claims are based on the same legal theory—that Tyson's gang time compensation system is unlawful. In addition, among gang time paid employees, the evidence only shows

factual differences regarding the specific PPE these employees wear and the tools they carry. The court does not feel these differences necessitate individualized inquiry to prove a violation because most all gang time employees wear at least the same basic PPE and use some kind of knife or tool. Moreover, there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited. Again, as with the court's finding concerning commonality, those employees that are not paid via gang time do not have the "same or similar" grievance as the class representatives because the class representatives are or were paid on a gang time basis. *Donaldson*, 554 F.2d at 830. Thus, the court only finds the typicality requirement met with respect to a class defined as those employees that are paid via gang time.

3. Adequacy of representation

"The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562–63. The Supreme Court has advised that the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231.

Tyson does not dispute that Plaintiffs' counsel is qualified to vigorously prosecute the interests of the class, but Tyson does dispute whether the class representatives have common interests with the members of the class. Tyson specifically points to the fact that the named plaintiffs do not represent all the

different job positions or even departments in the putative class. The six remaining named plaintiffs—Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia—have never worked in the Rendering, Material Handling/Load Out, or Maintenance departments.

Of course, if all six departments were relatively similar, particularly in regard to how the employees were paid, the named plaintiffs' inexperience in the Rendering, Load Out, and Maintenance departments would not matter much. The possibilities for conflicts of interest between class representatives and class members are obviously minimal when all plaintiffs in an IWPCL class action perform similar work and receive compensation under a similar pay system. But in this case the chances for conflicts of interest are greater because there is a significant difference, at least with respect to how they are paid, between most of the hourly employees in the Kill, Cut, and Retrim departments, and the hourly employees in the Rendering, Material Handling/Load Out, and Maintenance departments. That difference, of course, is that the Rendering, Material Handling/Load Out, and Maintenance departments are not paid via gang time.

The significance of this difference is highlighted by the Supreme Court's admonition that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Broadly defined, the interest and injury in this case is the desire to recover payment for

work performed that allegedly was not paid. Plaintiffs' complaint, however, belies such a broad definition. Plaintiffs' complaint is littered with allegations of Tyson's "unlawful compensation system," which Plaintiffs unequivocally assert as Tyson's use of "a system known as 'gang time' or 'line time.' " Dkt. # 2. While all named plaintiffs work in departments paid under this gang time system, the same cannot be said for all requested class members. In such a case, the court finds the named plaintiffs do not adequately represent all of the requested class. However, if the class is limited to those employees paid by gang time, the court sees no conflicts between the class representatives and those they represent.

4. Merged result

The commonality, typicality, and adequacy of representation requirements of Rule 23(a) "tend to merge" because they "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tele. Co. of Southwest*, 457 U.S. at 158 n. 13, 102 S.Ct. 2364. Whether looked at individually, or when the elements of Rule 23(a) are merged together, it is obvious to the court that the three disputed Rule 23(a) elements are not satisfied when the class is defined as all hourly production and support employees. Not all hourly employees are paid via gang time, which is the compensation system Plaintiffs allege is unlawful. However, it is also clear that if the class is redefined or confined to only those hourly employees paid via gang time, the requirements of Rule 23(a) are met,

including the numerosity requirement. Tyson did not dispute numerosity, and even under what is redefined as a smaller class, it is clear that numerosity is easily satisfied, when most of Tyson's 1600 employees are paid via a gang time system.

It is well within the court's authority to redefine Plaintiffs' proposed class. *See, e.g.*, *Robinson*, 111 F.Supp.2d 1101 (E.D.Ark.2000) (granting "plaintiffs' motion for class certification as modified"); Wright, § 1759 at 130–131 & n. 28 ("[I]f plaintiff's definition of the class is found to be unacceptable, the court may construe the complaint or redefine the class to bring it within the scope of Rule 23."). The court finds it appropriate to do so at this point. Therefore, the court will next analyze whether a class defined as those hourly employees paid on a gang time basis at Tyson's Storm Lake, Iowa, facility meet one of the subsections of Rule 23(b).

B. Rule 23(b) Legal Standards And Analysis

Parties seeking class certification must also show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem*, 521 U.S. at 614, 117 S.Ct. 2231. Plaintiffs do not claim they meet the requirements under Rule 23(b)(2), as that rule "permits class actions for declaratory or injunctive relief." *Id.* Plaintiffs claim they meet the requirements under either Rule 23(b)(1) or (3).

1. Rule 23(b)(1)

The Supreme Court summed up the purposes and requirements of Rule 23(b)(1) in *Amchem*:

> Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards

> of conduct for the party opposing the class," or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests." Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims.

521 U.S. at 614, 117 S.Ct. 2231 (citations omitted); *see Reynolds v. Nat'l Football League*, 584 F.2d 280, 283 (8th Cir.1978) (explaining certification under Rule 23(b)(1)(A) and (B)).

Subdivision (A) is intended to allow class certification when individual actions could have an adverse effect on the defendant. Wright, § 1773 at 10. Thus, the provision attempts to protect the party opposing the class. Under subdivision (A), "there obviously must be a risk that separate actions will in fact be brought if a class action is not permitted. Otherwise there is no danger that incompatible standards of conduct will be formulated by the courts." Wright, § 1773 at 11. In this case, there certainly is a risk that separate actions will in fact be brought—many potential plaintiffs are aware of the suit, as several hundred have filed consents at least with respect to the FLSA claim. However, the court does not see how individual lawsuits achieving different results would impair Tyson's ability to pursue a uniform

continuing course of conduct. Tyson would not be put in a conflicted position simply because Tyson might have "to pay damages to some class members but not to others or to pay them different amounts." Wright, § 1773 at 13; *see Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 99 (W.D.Mo.1997) ("Although individual lawsuits might end with different results, this does not justify certification of the class [under Rule 23(b)(1)]."). Thus, the court agrees with Tyson that Plaintiffs have not met their burden of proving class certification is appropriate under subdivision (A).

Subdivision (B) is intended to allow class certification when individual actions could have an adverse effect upon the putative plaintiffs. Wright, § 1774 at 24 ("Rule 23(b)(1)(B) allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members, rather than on the opposing party."). Under subdivision (B), and unlike subdivision (A), "it is not necessary to demonstrate that separate actions are likely or feasible in order to invoke Rule 23(b)(1)(B)." Wright, § 1774 at 25. It simply needs to be shown that individual actions would, "as a practical matter," be dispositive, impair, or impede the interests of other members not parties to the individual lawsuit. Plaintiffs argue that "[m]ost, if not all, of these workers lack the financial resources to litigate alone against a corporate giant like Tyson Foods." Dkt. # 35. Subdivision (B), however, is not really concerned with the financial resources of individual plaintiffs, but rather the financial resources of the defendant. *See In re Fed. Skywalk Cases*, 680 F.2d 1175, 1187 (8th Cir.1982) ("A class action may be certified under Rule 23(b)(1)(B) when a number of individuals claim rights to a share of a fund that is too small to satisfy in full

every individual's claim."). That is why Rule 23(b)(1)(B) is invoked in "limited fund" circumstances, whereby individual actions may deplete the limited amount of monetary recompense available and leave some individuals without a remedy. That is not the case here, and thus the court does not find Subdivision (B) applies to Plaintiffs' situation. Wright, § 1773 at 25 (noting the purpose of Subdivision (B) is "to protect the interests of all class members against any determination that would have an adverse effect on them").

2. Rule 23(b)(3)

"In general a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by settling their differences in a single action." Wright, § 1777 at 114. To be certified under Rule 23(b)(3), Plaintiffs must satisfy the "predominance" and "superiority" components of the rule. *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231. These requirements were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " *Id.* (quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697). Rule 23(b)(3) specifically lists four factors pertinent to the court's determinations regarding predominance and superiority:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

FED.R.CIV.P. 23(b)(3).

Under the first factor, the court does not foresee a great interest among individual plaintiffs in proceeding individually. Such individualized adjudications would be financially burdensome, and some individual plaintiffs may not stand to gain a significant remedy. On the other hand, the advantages of determining the common issues by means of a class action are apparent, as all employees in the class could finalize their claims in one proceeding. Under the second factor, the class representatives have already conducted a substantial part of discovery, and thus individual adjudications would duplicate work already performed. Under the third factor, Tyson's Storm Lake, Iowa, facility is located within the Northern District of Iowa, and there is no reason why this District Court would not be a desirable forum for the litigation. All the evidence is very close. Under the fourth factor, the court does not foresee problems of manageability. No indication of counter-claims are present, and the size of the class is not too large or dispersed among several Tyson plants.

Regarding the predominance inquiry, the "court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Blades*, 400 F.3d at 566. In other words, the court must look at the nature of the evidence plaintiffs would have to come

forward with to establish a prima facie case, and if "the members of the proposed class will need to present evidence that varies from member to member, then it is an individual question." *Id.* In this case, class members need to prove that they are not paid for all the work they perform under Tyson's gang time compensation system. To do so, the class members would need to show that they perform work which goes unpaid, which Plaintiffs claim is the time they spend donning and doffing their PPE or cleaning their equipment. Clearly, not all employees paid on gang time wear the same PPE or use the same equipment. However, common evidence that Tyson's compensation system cannot account for even the basic or standard PPE employees need to don, doff, and clean would establish a prima facie case for the class. Individual questions may exist, but the court does not believe they predominate.

Regarding the superiority inquiry, the court is to compare the possible alternatives to a class action and determine if any is superior to the proposed class action. The alternatives to class action litigation in this case are individual lawsuits by class members. There is no doubt this would be more burdensome on the class members, and it would likely be less efficient use of judicial resources. *See Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234–35 (9th Cir.1996) ("Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation."). Under such circumstances, the court finds the superiority requirement met.

C. Certified Class Action

Based on the above analysis, the court finds that Plaintiffs' motion for class action certification under

Rule 23 should be granted as modified. That is, the court hereby certifies in accordance with Rule 23(c)(1)(B) the following class under Rule 23(b)(3):

> All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2005, to the present, and who are or were paid under a "gang time" compensation system in the Kill, Cut, or Retrim departments.

The notice and specific orders regarding the certification of Plaintiffs' class action under Rule 23 are set forth in the following conclusion and order.

VI. CONCLUSION AND ORDER

The court finds Plaintiffs can maintain their FLSA and IWPCL actions together. The FLSA does not preempt Plaintiffs' IWPCL claim, and the differences between the collective action and class action procedures do not require the court to dismiss, deny, or limit Plaintiffs' IWPCL claim.

The court also *grants, as modified* by the court's revised definitions, *see infra* Parts IV.C, V.C, Plaintiffs' motion for conditional certification of their FLSA claim as a collective action under § 216(b), *see* Dkt. # 34, and Plaintiffs' motion for certification of their IWPCL claim as a class action under Rule 23, *see* Dkt. # 35.

The class members of both the FLSA collective action and the Rule 23 class action deserve notice of the Plaintiffs' claims and their opportunity to "opt-in" or "opt-out" as the case may be. *See* FED.R.CIV.P. 23(c)(2)(B) ("For any class that is certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort."); Wright, § 1807 at 485 ("The FLSA requires that notice be given to allow plaintiffs to opt in. "). Because the classes are identical (except for a temporal difference)[23] and there is likely confusion to arise among members receiving two notices, the court believes the best course of action is to authorize and craft one notice that informs all opt-in members and all opt-out members of their rights. The court orders *Plaintiffs to submit a draft proposed notice* that meets

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[23] Regarding the temporal difference, the court believes it is important to note that the statute of limitations operates differently in class actions and collective actions. *See* Wright, § 1807 at 476 ("Another difference flowing from the opt-in requirement is the treatment of the statute of limitations."). The filing of Plaintiffs' complaint tolls the statute of limitations for the Rule 23 class action members "until the class certification decision has been made, or until an individual class member opts out." *Id.* Under the FLSA,

> [a]n action is considered to be commenced, for statute of limitations purposes, either (1) when the complaint is filed, if the plaintiff is named in the complaint and filed a written consent to become a party at the time the complaint was filed; or (2) on the date a consent to become a party was filed, if the plaintiff was either unnamed in the complaint or failed to file a consent at the time the complaint was filed.

Frye v. Baptist Memorial Hosp., Inc., No. 07–2708 Ma/P, 2008 WL 2117264, at *3 (W.D.Tenn. May 20, 2008) (citing 29 U.S.C. § 256(a) and *Piper v. RGIS Inventory Specialists, Inc.*, No. C–07–00032 (JCS), 2007 WL 1690887, at *6 (N.D.Cal. June 11, 2007)). The court does not believe this difference necessitates specifying a different date in the FLSA collective action class definition, although this principle will be important when addressing Tyson's statute of limitations affirmative defense. Dkt. # 15.

the requirements of the FLSA[24] and Rule 23(c)(2)(B)[25] *within ten days*. Tyson shall have *five days to respond* to Plaintiffs' draft, and thereafter the court will finalize the proposed notice.

The six named plaintiffs—*Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes,* and *Heribento Renteria*—are *designated as class representatives for the collective and class actions,* and the court *appoints the lead counsel of record* for Plaintiffs, under the standards in Rule 23(g), as class counsel for Plaintiffs' IWPCL class action and FLSA collective action. The court also orders *Tyson to provide within twenty days* to Plaintiffs' counsel a listing of the names and addresses of all Tyson employees that meet the court's definition of the FLSA collective action class and IWPCL class

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[24] The FLSA does not specifically state what kind of notice must be given, but other sources provide insight. *See generally* Wright, § 1807 at 485–487, 493 n. 57.

[25] Rule 23(c)(2)(B) states:

> For any class that is certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

FED.R.CIV.P. 23(c)(2)(B).

action class in this case. Further orders shall accompany the court's finalization of notice.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 12-3753

PEG BOUAPHAKEO, *et al.*,

Appellees,

v.

TYSON FOODS, INC.,

Appellant,

Nov. 19, 2014

Appeal from U.S. District Court for the Northern District of Iowa—Sioux City (5:07-cv-04009-JAJ).

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Chief Judge RILEY, *Judge* WOLLMAN, *Judge* LOKEN, *Judge* GRUENDER, and *Judge* SHEPHERD would grant the petition for rehearing en banc.

Judge BEAM would grant panel rehearing.

BEAM, Circuit Judge, dissenting to the denial of rehearing by the panel and rehearing by the court en banc in this matter.

As aided and abetted by this court, this dispute becomes yet another manifestation of a professionally assembled class action lurching out of control. *See generally* Review and Outlook, *Tort Blowout Preventer,* Wall St. J., Oct. 24, 2014, at A12. From the decisions of the panel and the court en banc denying rehearing, I dissent.

I. BACKGROUND

At the outset, I include by reference my panel dissent. *Bouaphakeo v. Tyson Foods, Inc.* 765 F.3d 791, 800 (8th Cir.2014) (Beam, J., dissenting). And, at the risk of a small measure of repetition, I review and restate a portion of the procedural and evidentiary record from the district court.

The trial court conditionally and preliminarily, but erroneously, certified a 444-person Fair Labor Standards Act (federal) class (FLSA), including the named plaintiffs, and a 3,344 Iowa (state) class, also including the named plaintiffs, all of whom are either present or former employees of Tyson's Storm Lake, Iowa, facility. The backbone of these supposed classes is Tyson's "gang time" production line. The jury was instructed that the plaintiffs make no claim for the time that they were actually on the production line, known as "gang time."

However, these gang time production line employees are required to wear an array of safety and sanitary equipment depending upon the job function they are performing at the time and the department to which they are assigned on a given day. Use of this equipment requires pre- and post-production line working time to put on, take off and rinse, and some additional walking. Tyson agrees that actual time spent for this doffing, donning, rinsing and walking is compensable. Thus, the only issue in dispute is the

temporal extent of these pre- and post-production line activities and the individual pay generated through them for each member of the putative classes.

Of course, this time/pay issue has existed well prior to commencement of this particular case, a circumstance that is fully relevant to the reasoning of the panel majority.

The parties have jointly stipulated that as early as 1998, Tyson had studied the relationship, application and compensability of the knife-connected and sanitary item use in connection with the gang time work. This study included the temporal duration of these doffing, donning, rinsing and walking activities. Without my detailing all such factors involved and applied, these time studies resulted in extra overtime pay—the so-called Tyson K-code payments. These calculations and payments were used by the classes' expert witnesses at trial, as I will later discuss in more detail. The K-code wage payments were based on one or more four- to eight-minute daily segment calculations, depending upon the department worked and the equipment used. And they were, as indicated, intended to compensate employees for the doffing, donning, rinsing and walking activities involving the protective and sanitary item equipment. These wage payments in some measure or another were paid from 1998 until at least June 28, 2010, well within the time frame of this action.

Accordingly, contrary to the panel opinion's statements and inferences, there is no issue of "liability"[1] for overtime pay, if earned—the sole issue

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[1] Liability is defined as "legal responsibility to another enforceable by civil remedy." *Black's Law Dictionary* 1053 (10th ed.2014).

before the court at this point is a jury's determination, upon proper instructions on the law, of individual compensatory damages,[2] if any, for each member of the putative classes and the entry of a final judgment that, upon execution,[3] results in individual wage payments to all lawfully certified members of a lawfully assembled class. In short, under binding precedent of the Supreme Court and this court, if an employee suffers no damages by way of unpaid wages, he or she is not a proper member of an alleged federal or state class and the employer has no liability for such a class claim asserted by an employee or his or her named plaintiff representatives. *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir.2005) ("[D]amages to all class members must be shown to justify the class action."). Here, because the class representative's evidence clearly shows that numerous members of the certified putative classes suffer no damages, there is neither a legally certified class nor a final judgment that can lead to individual wage loss payments to any class member. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 & n. 15, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints. "). Thus, the supposed classes must be decertified and dismissed or, at least, remanded to the district court for proper recertification of a lawfully assembled class and entry of a final judgment identifying damages specific to

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[2] "'Damages are the sum of money which a person wronged is entitled to receive from a wrongdoer as compensation for the wrong.'" *Black's Law Dictionary* 471 (10th ed.2014) (quoting Frank Gahan, *The Law of Damages* 1 (1936)).

[3] An execution is "[t]he act of carrying out or putting into effect" a court order or judgment. *Black's Law Dictionary* 689 (10th ed.2014).

each individual member of a legitimate class. *Genesis Healthcare Corp. v. Symczyk,* — U.S. ——, ——, 133 S.Ct. 1523, 1528, 185 L.Ed.2d 636 (2013) (holding that for purposes of Article III, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed") (quotations omitted).

II. DISCUSSION

A.

The panel majority substantially depends upon *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) in rendering judgment in this appeal. But, respectfully, *Mt. Clemens* bears no weight whatever in support of the majority's attempted validation of its counter-factual legal conclusions.

The panel states, "[A]pplying Tyson's K-code policy and expert testimony to 'generate answers' for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) (allowing liability based on 'just and reasonable inference' when complete records do not exist.)." *Bouaphakeo,* 765 F.3d at 797 (second alteration in original). But, the Supreme Court in *Mt. Clemens* does not explicate, generally or specifically, language supportive of the panel majority's above statements. And, standing alone, the panel's statements are irrelevant to this case because individual "*damages,*" not group liability, are the fighting issue.

The panel further states, "[f]or the donning, doffing, and walking in *Mt. Clemens,* testimony from eight employees established liability for 300 similarly situated workers. *Mt. Clemens,* 328 U.S. at 684; *Mt.*

Clemens Pottery Co. v. Anderson, 149 F.2d 461, 462 (6th Cir.1945) (discussing testimony)." *Id.* at 799. With this "eight employees established *liability*" statement, the panel erroneously seeks to validate and affirm in this case the lump sum *damages* verdict returned by the trial jury as instructed by the trial court, which verdict was used, in turn, by the trial court to enter an erroneous lump sum compensatory damages judgment.

While there is reference to eight employees' testimony in the *Mt. Clemens* Sixth Circuit opinion, 149 F.2d at 462, and while such testimony may have been relevant to the Mt. Clemens' group *liability* for overtime pay under the FLSA given the circumstances of that litigation and that particular appeal, the panel majority's reference to the Sixth Circuit's discussion of trial testimony has no relevance whatever to the *damages* at issue in either the Supreme Court's *Mt. Clemens* opinion or in this case. Indeed, in *Mt. Clemens,* the Supreme Court, referring to individual class damages, stated, "we remand [this] case for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the de minimis doctrine and calculating the resulting damages under the [FLSA]." 328 U.S. at 694.

Also, questions of liability in a FLSA case or in a Federal Rule 23(b) case guided by the FLSA present matters of law for the court. *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *Jarrett v. ERC Props., Inc.,* 211 F.3d 1078, 1081 (8th Cir.2000). Damages, on the other hand, are matters for jury determination under properly drawn instructions on the law from the trial court. *Alvarez Perez v. Sanford–Orlando Kennel Club, Inc.,* 515 F.3d 1150, 1163 (11th Cir.2008) (discussing

the jury's role in assessing compensatory damages and the court's role in the award of liquidated damages under the FLSA); *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 69 (8th Cir.1985) ("[C]alculation of damages are questions of fact and peculiarly within the province of the jury.").

Mt. Clemens does say, as noted by the panel opinion, an employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 687, *see also Holaway v. Stratasys, Inc.*, No. 14-1146, 2014 WL 5755987 (8th Cir. Nov.6, 2014). And, notwithstanding the panel's inference to the contrary, that individual burden of proof is by a preponderance of the evidence and the burden runs to each putative class member, although presumably with the benefit of admissible circumstantial evidence adduced by the class member or by the classes' named plaintiffs.

In *Mt. Clemens,* the Supreme Court, noting an employer's responsibility to keep adequate payroll records under 29 U.S.C. § 211(c) of the FLSA, and further noting that Mt. Clemens had not done so, unremarkably held, "[i]n such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. The long established "reasonable inference rule" by definition, simply identifies the enduring evidentiary principle "that a jury, in deciding a case, may properly consider any reasonable inference drawn from the evidence presented at trial." *Black's Law Dictionary* 1457 (10th ed.2014). It is, at bottom, the simple recognition of the availability of circumstantial

evidence. In this vein, there is precedent for the proposition that if an employer has failed to keep payroll records, employees are to be awarded compensation based upon the most accurate basis possible. *Holaway,* 2014 WL 5755987, at *3. And, "once the employee has shown work performed for which the employee was not compensated, and sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference." *Id.* at *2 (quotation and internal quotation omitted).

Such burden-shifting rationale is not applicable in this case for at least two reasons. First, well over half of the putative class employees in this case have not "shown work performed for which [they were] not compensated." *Id.* Indeed, they have affirmatively shown through their own evidence that they have performed no work for which they have not been compensated.

Second, in this case, there is clearly no dearth of adequate attendance, assignment, equipment, work time and payroll records as contemplated by *Mt. Clemens* and *Holaway.* Complete time and work records exist and were available to each Tyson employee and their expert witnesses—including entitlement to and payment of K-code wages resulting from donning, doffing, rinsing and walking specific to each employee and department. The individual members of the alleged classes simply disagree with Tyson's K-code time calculations and, thus, assume the burden of proof of a different result by adducing a preponderance of admissible evidence to the contrary. However, what the class representatives actually

succeed in proving with their expert testimony in this case is that a large number of the members of their assembled classes actually suffered no damages at all and, under Supreme Court precedent, and that of this circuit, cannot, in the final analysis, be part of a lawfully created class. *Genesis Healthcare*, 133 S.Ct. at 1528; *Amchem Prods.*, 521 U.S. 591, 613 & n. 15, 117 S.Ct. 2231, 138 L.Ed.2d 689. Neither does any established precedent extend employer overtime pay liability to any member of a purported class who has been fully reimbursed for his or her working time by the Tyson K-code payments. *Blades*, 400 F.3d at 571.

B.

As noted in my panel dissent, plaintiffs, as required by *Mt. Clemens*, offered individual member damage evidence at trial. Dr. Liesl Fox made and presented to the jury individual damages calculations that incorporated time study information created by Dr. Kenneth Mericle. Dr. Fox, without objection by Tyson, also adopted Tyson's several employment records including Tyson's individual K-code payment register. The only identifiable variable fact that Dr. Fox used in her damages calculations was the substitution of Dr. Mericle's department-by-department time studies of 21.25 minutes and 18 minutes per employee per day in lieu of Tyson's 4-minute and 8-minute K-code determinations. Dr. Fox, using Dr. Mericle's more generous time measurements, testified that at least 212 members of the certified class had no pay claim because wages due for time spent doffing, donning, rinsing and walking—less the already proffered individual K-code payments—"would not have been enough to kick them into overtime." Further, plaintiffs' evidence indicated that even using Dr. Fox's

damage calculations, there were at least 509 additional workers whose damages ranged from $0.27 to less than $100, thus falling into the de minimis[4] range mentioned in *Mt. Clemens*. In this regard, Dr. Fox's complete range of individual damages ran from $0.00 to $9,903.25—that when finally totaled tallied up to the $6,686,082.36 jury demand by the plaintiffs that I next discuss.

Dr. Fox's total damages calculation, using, as earlier noted, Dr. Mericle's time observations of 21.25 minutes in the kill department and 18 minutes in the fabrication department, presented to the jury, through plaintiffs' trial exhibit 345, class damages of $8,297,784.80–$1,611,702.44 for the FLSA class and $6,686,082.36 for the Iowa class. On cross-examination concerning her calculations, Dr. Fox was asked "if an employee worked less than Dr. Mericle's [time study] numbers it is possible that Tyson's K-code payments already could have fully paid them for that time, right?" Dr. Fox responded, "[p]otentially."

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[4] The "de minimis doctrine" is actually unique to the FLSA and first appeared in *Mt. Clemens*. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 377 (4th Cir.2011) (Wilkerson, J., concurring). Very generally, it stands for the proposition that de minimis periods of work are noncompensable. "In *[Mt. Clemens]*, the Court acknowledged that a de minimis rule is necessary because '[t]he workweek contemplated by [the FLSA] must be computed in light of the realities of the industrial world,' and those 'realities of the industrial world' must include the commonsense observation that the computations of ever smaller increments of time may eventually become so onerous that they should not be the subject of endless litigation." *Id.* at 378 (quoting *Mt. Clemens*, 328 U.S. at 692).

Dr. Fox was then asked and answered the following questions:

Q. And do you remember telling me you can't just take a fraction or a portion of that because as you go down in numbers, people—I think you told Mr. Wiggins this this morning—you start finding that people start dropping out of overtime, right?

A. That's correct.

Q. So if somebody was at 41 hours, let's say 40 and a half hours, and you took out an hour because let's say the jury concludes that work didn't take as long as Dr. Mericle said, a lot of those people would fall into non-overtime, correct?

A. That's correct. I don't know how many, but yes, some would.

Q. So you can't just take your original $6.6 million number and say well, we are going to cut it in half if we find Mericle's numbers are overstated by twice or let me put this a better way.

If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?

A. No, you cannot.

Q. Right. And the lower and lower the number of minutes goes, the more and more people start falling out of overtime, right?

A. That's correct.

Q. So at some point if you drop the number low enough, you would expect that people would be at zero on your chart, right?

A. Some people would, yes.

> Q. Okay. Well, anybody whose K-code time covers the amount of time the jury thinks should be paid would be a zero, right?
>
> A. That's correct.

So, notwithstanding exhibit 345 with its damages calculation of $8,297,784.80, class counsel conceded that the FLSA class, in part, duplicated the Iowa Class, and then asked the jury to return a verdict for the above-stated $6,686,082.36 for both of the classes. The jury, obviously rejecting Dr. Mericle's over-generous time study conclusions, returned a verdict of $2,892,378.70. This figure amounts to 43.25 percent of the above-stated jury demand, which demand was, as above noted, based upon the sum total of the Dr. Fox class-member itemization received in evidence as trial exhibit D-2274, which exhibit already included 212 members with no damages and an additional 509 members with de minimis damages.

Thus, giving the best gloss available to the plaintiffs under the evidence they themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages whatever and the balance have markedly lower individual damages that are now virtually impossible to accurately calculate.

C.

The status of this case can be summarized as follows:

> 1. A certified class of 3,344 persons, more than one-half of which have no provable damages, are the joint beneficiaries of a lump sum jury verdict and lump sum district court judgment in the amount of $2,892,378.70 in compensatory damages.

2. The lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due the limited number of members of the certified class with provable damages.

3. Neither the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom.

If the case must be returned to the district court for further action concerning distribution of damages, the existing judgment is clearly not a final appealable order. Very simply, a final order is one which "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I.M. & S. Ry. Co. v. S. Express Co.*, 108 U.S. 24, 28–29, 2 S.Ct. 6, 27 L.Ed. 638 (1883). Judgments that leave the "assessment of damages or awarding of other relief" unresolved, "have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976).

III. CONCLUSION

There was a motion to decertify the class after judgment. At that point, binding precedent indicates that the district court should have either decertified the classes entirely or recertified them in accordance with only those putative members with provable damages, if such damages were reasonably discernible from the evidence available at that time.

Accordingly, I dissent from the panel's denial of the requested rehearing and, to the extent I am by law authorized to do so, the denial of rehearing by a majority of the court en banc. The important issues

and extraordinary circumstances presented by this case should be properly considered—especially noting that several other somewhat similar cases are presently at issue in the district courts of this circuit and this court on appeal.

BENTON, *Circuit Judge*, respecting the denial of rehearing en banc.

This court held that the district court did not abuse its discretion in certifying a class of Tyson Foods, Inc. employees, who presented sufficient evidence to support the jury's award of overtime pay.

The dissent to the denial of panel rehearing claims that the class lacks commonality and focuses exclusively on damages issues. But all parties asked the jury to resolve Tyson's liability: Did Tyson's K-Code policy fully compensate its Storm Lake, Iowa, "gang-time" employees for their donning and doffing activities? *See Verdict Form, Question No. 5* ("Did the plaintiffs prove that they are entitled to additional compensation for any of the donning and doffing activities at issue in this case?"). *See also Jury Instruction No. 3* ("Summary of Claims"). This was a common contention of the class. *See Wal-Mart Stores, Inc. v. Dukes*, — U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (noting that a class's "claims must depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

Contrary to the dissent, *Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) ("It is enough under these

circumstances if there is a basis for a reasonable inference as to the extent of the damages."). Tyson kept no records of donning and doffing time.[5] A "reasonable inference" demonstrates compensable time. *See id. See also Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 881–82 (8th Cir.2011) (holding, based on *Mt. Clemens*, that if Applebee's did not track time employees spent on tipped verus nontipped duties, they could demonstrate their nontipped work through reasonable inference). The dissent asserts that if some employees are entitled to no overtime, then no "reasonable inference" may show the overtime worked by other employees. This stands *Mt. Clemens* on its head: The dissent makes "the burden of proving that [the employee] performed work for which he was not properly compensated" into "an impossible hurdle for the employee." *Mt. Clemens*, 328 U.S. at 687.

The dissent implies that there is no Article III standing because some employees are entitled to no overtime. But the "federal courts do not require that each member of a class submit evidence of personal standing," so long as each member may allege injury. *Halvorson v. Auto–Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir.2013), *quoting Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir.2010) (internal quotation marks omitted). Here, all members of the class were

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[5] Tyson kept attendance, assignment, equipment, work time, and payroll records. These records permitted the plaintiffs' experts to calculate individualized damages. These records, however, do not reflect the amount of time employees spent donning and doffing. *See Mt. Clemens*, 328 U.S. at 688 ("[E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.").

Tyson "gang time" employees that necessarily spent time donning and doffing, and therefore each could allege he was undercompensated by Tyson's K-Code policy. The failure of some employees to demonstrate damages goes to the merits, not jurisdiction. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757-78 (7th Cir.2014) (explaining that a class definition is too broad if it includes those "who *could not* have been harmed," but is acceptable if it includes those "who *were not* harmed"). *See also Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir.2009) ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case . . if [class members] are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification."). It also does not overwhelm commonality, particularly post-verdict. *See Comcast Corp. v. Behrend*, —— U.S. ——, ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013) (allowing damages variations unless "individual damage calculations overwhelm questions common to the class"). *See also Gortat v. Capala Bros.*, 949 F.Supp.2d 374, 383 (E.D.N.Y.2013) ("Research has failed to reveal a single decided case or a single sentence in the legal literature to which a similar post-verdict [decertification] motion has been addressed."), *aff'd* 568 Fed.Appx. 78, 79 (2d Cir.2014); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256 (10th Cir.2014) (affirming denial of decertification motion due to lateness and prejudice when motion was filed one week before trial).

The dissent's claim that more than half the class has no damages is speculative. True, the jury lowered the experts' donning and doffing estimates. But it does not follow that, because the jury awarded the plaintiffs

43.25 percent of their original jury demand, more than half the class has no damages. The record shows that many employees regularly worked overtime, so that all of their donning and doffing time is fully compensable. Likewise, nothing in the record or case law supports the dissent's conclusion that damages under $100 are de minimis. *See Verdict Form, Question No. 4, citing Jury Instruction No. 6* ("Employers must compensate employees for even small amounts of time, unless the time is so minuscule that it cannot as a practical administrative matter be recorded for payroll purposes. There is no precise amount of time that may be denied compensation as 'de minimis.' "). *See also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation marks omitted)).

The court, without objection, instructed the jury only as to aggregate damages. *See Verdict Form* (giving one line for the jury to "indicate how much you award for" pre- and post-shift donning and doffing). *See also In re Urethane Antitrust Litig.,* 768 F.3d at 1269 ("Dow cannot complain about the uncertainties inherent in an aggregate damages award because Dow never requested individualized findings on damages."). The court then entered a final judgment awarding the class aggregate damages. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 479 n. 5, 481 n. 7, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (rejecting Boeing's argument that the judgment is not final until class members have presented individual claims because Boeing's liability was not contingent upon individual claims and the "judgment terminated the

litigation between Boeing and the class concerning the extent of Boeing's liability"). In this case, employees without damages are not entitled to allocation of the award. *Jury Instruction No. 8* ("Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages."). Beyond that, Tyson has no interest in how the fund is allocated among the class members. *See Boeing*, 444 U.S. at 481 & n. 7 ("The judgment on the merits stripped Boeing of any present interest in the fund. Thus, Boeing had no cognizable interest in further litigation between the class and its lawyers over the amount of fees ultimately awarded from money belonging to the class."). *See also In re Urethane Antitrust Litig.*, 768 F.3d at 1269 (holding Dow "has no interest in the method of distributing the aggregate damages award among the class members" and rejecting Dow's argument that a jury must determine which class members suffered less or no injury), *citing Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir.2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves.").

APPENDIX G

FEDERAL STATUTES

29 U.S.C. § 207. Maximum Hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

29 U.S.C § 216. Penalties

* * * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the

defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * * *

APPENDIX H

FEDERAL RULE

Federal Rules of Civil Procedure Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Dr. Mericle's Observed Times Vary Widely

Fabrication (Cut and Retrim)

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	88	.583	10.333
Pre-shift: dip scabbard, wash hands	120	.010	.580
Pre-shift: don equipment in department	23	1.017	5.133
Pre-lunch: doff equipment	Less than one minute	.033	3.917
Post-lunch: don equipment		.450	5.650
Post-shift: doff, clean equipment in department	28	.300	3.567
Post-shift: inspect, disinfect at door	18	.033	.383
Post-shift: doff, store equipment at locker	21	1.783	9.267

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Dr. Mericle's Observed Times Vary Widely

Kill

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	51	2.100	13.283
Pre-shift: don equipment in department	11	.917	4.550
Pre-lunch: doff equipment	Less than one minute	.417	2.683
Post-lunch: don equipment		.500	6.350
Post-shift: doff, clean equipment in department	52	.200	5.750
Post-shift: doff at locker	15	1.967	5.517

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Supreme Court, U.S.
FILED
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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage/hour violations arising out of an employer's underpayment for employee time spent donning and doffing protective equipment and walking to work sites, the use of individual timesheet evidence and representative proof concerning donning, doffing and walking times was permissible and sufficient to sustain the jury's verdict of liability.

2. Whether a class may be certified when it contains members who may not have been injured.

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INTRODUCTION

Workers at a Tyson Foods meat-processing plant sued Tyson for undercompensating them for time spent walking to their worksites and donning and doffing protective equipment necessary to perform their dangerous jobs. Their lawsuit was certified as a class and collective action. The case was tried using a combination of individual timesheets and, because Tyson kept no records of actual donning/doffing time, representative proof. A jury found in the favor of the plaintiff class, and both the district court and the court of appeals rejected sufficiency-of-the-evidence challenges to the verdict.

Neither of the issues Tyson raises warrants review. First, Tyson objects to the use of representative proof under this Court's *Mt. Clemens* rule, although that rule has been successfully implemented by the lower courts for nearly seventy years. As a threshold matter, Tyson waived that issue by proposing a jury instruction, adopted by the trial court, telling the jury to consider the evidence to which Tyson now objects. In any event, Tyson is incorrect that either *Mt. Clemens* or the use of representative proof generally has created a circuit split. *Mt. Clemens* created a special rule for wage/hour cases. The cases on which Tyson relies either do not involve wage/hour claims or involve quite different factual circumstances than those here. When the claimed conflict over representative proof is set aside, what remains of Tyson's first question is one manifestly unsuited for review: the sufficiency of the evidence in this particular case.

Second, Tyson asks whether a class may be certified if some members may not have suffered

injury. This question is not properly presented here because the court of appeals did not address it: instead, it found that Tyson had forfeited the argument by inviting the error it now challenges. Whether the court was right on that point is not itself a question that merits review, and Tyson does not contend otherwise. Nor, indeed, do Tyson's questions presented encompass a challenge to the court's holding on forfeiture. Even if these points could be overlooked, the issue would be better addressed in a case in which the lower court decided it. In any event, Tyson does not show a square conflict among the circuits on the question whether a class may be certified if it contains potentially uninjured members. Several circuits have, consistent with this Court's standing jurisprudence, answered that question in the affirmative after careful analysis. Although Tyson points to a few circuit decisions that contain conflicting statements, these statements were unaccompanied by analysis and were not outcome-determinative.

The court of appeals properly held, under the deferential standard applicable to sufficiency-of-evidence review, that sufficient evidence supported the jury's verdict. The petition should be denied.

STATEMENT OF THE CASE

Respondents are a class of employees at the Storm Lake, Iowa, meat-processing facility of petitioner Tyson Foods. Pet. App. 1a. Tyson compensates its employees for what it calls "gang time" — that is, time when the employees are at their work stations and the production line is moving. *Id.* at 2a. Before 2007, for employees in a department where knives are used, Tyson added four

minutes of additional time ("K-code time") for donning and doffing protective equipment. *Id.* From February 2007 to June 2010, Tyson also added several minutes for pre- and post-shift walking time. *Id.* Tyson does not record the time employees spend donning and doffing personal protective equipment and walking to their work stations. *Id.*

In 2007, the employees brought federal Fair Labor Standards Act (FLSA) and Iowa Wage Payment Collection Law (IWPCL) claims against Tyson seeking unpaid overtime. *Id.* at 2a, 5a. The employees claimed that that Tyson's K-code time was insufficient to cover compensable pre- and post-production activities including donning, doffing, and walking. *Id.* The district court certified the FLSA claims as a collective action and the IWPCL claims as a class action under Federal Rule of Civil Procedure 23. *Id.* at 5a. The FLSA claim and IWPCL claim were substantively the same and subject to the same "terms of proof." *Id.* at 5a n.2.[1]

At a nine-day trial, plaintiffs introduced average donning, doffing and walking times calculated from 744 employee observations and applied this evidence to class members individually using individual timesheets and pay data from Tyson. *Id.* at 5a, 13a. The plaintiffs' expert testified that the sample was "large for this type of study" and "representative." *Id.* at 13a. Tyson's Director of Human Resources

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[1] For simplicity, and following Tyson's convention, respondents will refer to themselves hereafter as a "class" rather than repeating that they are both a class and collective action. There was no separate verdict on the claims of the collective-action opt-in plaintiffs.

conceded that K-code time did not include the donning and doffing of much protective equipment that was non-unique. *Id.*

The jury was instructed to return an aggregate verdict on damages, but Tyson did not object to an aggregate verdict, and the jury was also instructed that individuals who had already received full compensation could receive no award. *See id.* at 130a-31a (Benton, J., respecting the denial of rehearing en banc); *see also id.* at 10a (majority opinion) ("[T]he jury was instructed, 'Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'"). Backpay was calculated separately for each class member based on his or her unique days and hours worked over 40 per week and his or her hourly rate. *See* Trial Tr., *Bouaphakeo v. Tyson Foods*, No 5:07-cv-04009 (N.D. Iowa) ("Tr."), at 1266-70 (testimony of plaintiffs' expert Dr. Liesl Fox). Individuals whose damages amount was less than $50 were excluded. Jt. App'x, *Bouaphakeo v. Tyson Foods*, No. 12-3753 (8th Cir.) ("8th Cir. JA"), at 869-71 (Pls.' Exs. 345, 346 & 348); Tr. at 1278, 1285. The jury had before it exhibits containing individualized damages breakdowns. 8th Cir. JA 904-72, 1004-83 (Def.'s Exs. 2272 & 2274).

The jury returned a verdict for the class of just under $2.9 million; with liquidated damages, the final judgment was just under $5.8 million. Pet. App. at 5a-6a.

The court of appeals affirmed. First, the court rejected Tyson's argument that the variations among class members in donning and doffing time defeated class certification under *Wal-Mart Stores, Inc. v.*

Dukes, 131 S. Ct. 2541 (2011). The court explained that, unlike in *Dukes*, Tyson had a single policy that applied to all class members. Pet. App. 8a. The use of representative proof was permitted by *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the court explained, because Tyson does not record its employees' donning, doffing, and walking time, and individual variances in numbers of minutes spent on these activities did not prevent a common adjudication. Pet. App. 8a. Next, regarding Tyson's argument that a class cannot contain any uninjured members, the court found that a jury instruction requested by Tyson and accepted by the court had invited the claimed error. *Id.* at 8a-10a.

As for Tyson's claim that the district court had held an impermissible "trial by formula," the court of appeals again found that *Mt. Clemens* justified the use of representative proof and further noted that the class used individual employee time records, *id.* at 10a, to "apply this [representative] analysis to each class member individually," *id.* at 11a. Finally, the court of appeals rejected a sufficiency-of-the-evidence challenge to the verdict on damages because the plaintiffs' use of a "sample of 744 observations of employee donning, doffing, and walking" was supported by expert testimony that "the sample was large for this type of study, representative, and approximately random" and that "the study used 'accepted procedure in industrial engineering.'" *Id.* at 13a. Moreover, Tyson's own Director of Human Resources testified that "K-code time did not include the donning and doffing of much non-unique" protective equipment, and Tyson's own data "showed the amount of K-code time each individual received." *Id.*

Judge Beam dissented, arguing that individual differences in donning and doffing times made class treatment inappropriate, *id.* at 21a-23a, and that the class and collective claims should have been treated separately, *id.* at 23a-24a.

The court denied Tyson's petition for rehearing and rehearing en banc. *Id.* at 114a. Judge Beam again dissented, arguing that the panel opinion misapplied *Mt. Clemens*, *id.* at 119a-22a, and that the verdict would compensate individuals with no or de minimis damages, *id.* at 122a-25a. Judge Benton, the author of the majority opinion, wrote a brief opinion respecting the denial of rehearing en banc. *Id.* at 127a-131a. Responding to Judge Beam on the question of uninjured class members, Judge Benton observed that "[t]he court, without objection, instructed the jury *only* as to aggregate damages." *Id.* at 130a (citing the verdict form; emphasis added). Moreover, as Judge Benton explained, under the jury instructions, "employees without damages are not entitled to allocation of the award." *Id.* at 131a (quoting Jury Instruction No. 8: "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.").

REASONS FOR DENYING THE WRIT

I. The Use Of Representative Proof Here Does Not Warrant Review.

A. Tyson waived its objection to the use of representative proof.

In the district court, Tyson proposed jury instructions that incorporated the very methodology it now claims was erroneous. Specifically, Tyson proposed to instruct the jury that, in determining

damages, it should evaluate whether the plaintiffs showed the amount of uncompensated work "as a matter of just and reasonable inference" and that, if Tyson failed to negate the reasonableness of the inference to be drawn from plaintiffs' evidence, the jury could "then award damages to the employees even though those damages will only be approximate." Doc. 151, *Bouaphakeo v. Tyson Foods*, No 5:07-cv-04009 (N.D. Iowa), at 41 (Defs.' proposed jury instruction No. 23). The actual jury instruction given incorporated all of Tyson's proposed language. *See* Doc. 277, *Bouaphakeo*, at 16 (Instruction No. 8).

This Court has found waiver where a party proposed a jury instruction incorporating a standard to which it objected on subsequent review. *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (per curiam). That is precisely what happened here: Tyson proposed that the jury be instructed to consider representative proof and be permitted to award damages that were "approximate," but Tyson objects now that the jury has followed Tyson's own instructions.[2] Tyson has waived its argument on the first question presented.

B. Tyson's claimed circuit split on the use of representative proof does not exist.

Even aside from waiver, review is unwarranted.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that, in a wage/hour case in which the employer failed to keep records of time

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[2] Respondents raised this waiver argument below. *See* Br. of Appellees, *Bouaphakeo v. Tyson Foods*, No. 12-3753 (8th Cir. filed Apr. 29, 2013), at 28-29.

worked, employees could prove the amount of time worked "as a matter of just and reasonable inference." *Id.* at 687. In practice, that principle meant that a group of 300 employees in a FLSA collective action could make out their claim based on the representative testimony of eight employees whose estimates of the uncompensated time spent walking to work stations ranged from 30 seconds to 8 minutes and where walking distances varied from 130 feet to 890 feet. *See id.* at 683; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 461-62 (6th Cir. 1945) (discussing testimony and size of class). The IWPCL claim is subject to the same standards as the FLSA claim. *See* Pet. App. 5a n.2. Here, the application of *Mt. Clemens* is consistent with *Mt. Clemens* itself, with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and with the various appellate decisions that Tyson claims conflict with the decision below.

1. As in *Mt. Clemens*, the trial court permitted the use of representative testimony, notwithstanding individual variations of several minutes, where the employer failed to keep records of the time for which employees seek compensation. Pet. App. 8a.

Tyson stresses the individual nature of the unpaid overtime claims, quoting the requirement of *Mt. Clemens* that a worker prove "that *he* performed work for which *he* was improperly compensated." Pet. 19 (quoting *Mt. Clemens*, 328 U.S. at 687) (internal quotation marks omitted and emphasis added by Tyson); *see also id.* ("[The Eighth Circuit] said that to apply the time study to 'individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.

680, 687 ... (1946).' Pet. App. 8a. That is simply incorrect.").[3]

What Tyson overlooks is the manner in which, under *Mt. Clemens*, the individual is permitted to prove that he was improperly compensated in the specific context in which the employer failed to keep records: just and reasonable inferences from representative proof. *See* 328 U.S. at 683, 687, 693. The district court and court of appeals applied that

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[3] Tyson characterizes Judge Beam's dissent from the denial of rehearing en banc as raising a different concern about *Mt. Clemens*: according to Tyson, Judge Beam objected that *Mt. Clemens* permits representative proof on damages "*only after*" plaintiffs prove that each individual performed work for which he was not properly compensated. Pet 14 (emphasis in original). But the words "only after" do not appear in Judge Beam's dissent, which at times suggested the opposite of what Tyson claims he said. Specifically, Judge Beam suggested that *Mt. Clemens* permits the use of representative proof for liability but not damages. *See* Pet. App. 118a (Beam, J.) ("[I]ndividual '*damages*,' not group liability, are the fighting issue."); *id.* at 119a (explaining that representative proof in *Mt. Clemens* "may have been relevant to *liability*' but "has no relevance whatever to *damages*"). At other points, Judge Beam appeared to accept the use of representative proof for damages. *See id.* at 121a ("[T]here is precedent for the proposition that if an employer has failed to keep payroll records, employees are to be awarded compensation based upon the most accurate basis possible."). Whatever Judge Beam's view, it is different from what Tyson itself is arguing: that *both* liability and damages are individual issues not subject to representative proof in any respect. *See* Pet. 19.

Amicus U.S. Poultry & Egg Association makes an argument about *Mt. Clemens* similar to the one Tyson attributes to Judge Beam: that liability and damages must be treated differently. *See* Br. of U.S. Poultry & Egg Ass'n As Amicus Curiae 19-21. Again, that is not what Tyson argues here.

rule here, permitting no more and no less than this Court did in *Mt. Clemens*.

2. Tyson relies heavily on *Wal-Mart Stores, Inc. v. Dukes*, but that case is doubly distinguishable. First, *Dukes* disapproved the prospect of "trial by formula" in a massive sex-discrimination class action where the lower court had proposed that the subjective question at the heart of each class member's claim — "why was I disfavored," 131 S. Ct. at 2552 — be determined for all class members in proceedings concerning a sample set of class members, *see id.* at 2561. Absent a common discriminatory policy or practice, however, a "sample" determination that some plaintiffs had been discriminated against would say nothing about the reasons other plaintiffs had not been promoted. This case concerns a wholly different type of claim: a claim for unpaid overtime, which depends on common proof as to the employer's compensation policies and an objective determination of the amount of time worked. For nearly seventy years, such claims have been governed by the special *Mt. Clemens* rule suited to that context.

Second, the court of appeals here did not rely on representative proof alone, but instead noted that the class used individual employee time records, Pet. App. at 10a, to "apply this [representative] analysis to each class member individually," *id.* at 11a. The damages verdict was given in the aggregate, but Tyson did not object to an aggregate verdict, and the jury was instructed that individuals who had already received full compensation could receive no award. *See id.* at 130a-31a (Benton, J., respecting the denial of rehearing en banc).

3. None of the court of appeals cases Tyson cites conflicts with the decision below, either. First, most of the cases cited did not concern wage/hour claims at all, and so they did not apply *Mt. Clemens* and accordingly cannot conflict with the decision below on that point. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014) (antitrust case); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (RICO class action by cigarette purchasers based on fraud by manufacturers); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (class action by franchisees for breach of contract by franchisor); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (asbestos products-liability case); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (same).

Second, all of the cases on which Tyson relies involved much greater variation -- both in degree and in kind — among claims of class members than is present here. Although Tyson's employees differ as to precisely which protective equipment they don and doff, and exactly how long these activities and walking to their work stations take, the sum total of these differences is (as in *Mt. Clemens*) a matter of a few minutes, even by Tyson's own account. *See* Pet. 16, 18.

By contrast, the variations among the employees in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), were stark. There, the employees were home-satellite repair technicians who were paid on a per-job basis, not per hour, *id.* at 772-73, and so the "hourly wage varie[d] from job to job and worker to worker," *id.* at 774. Compounding the difficulties of using representative proof in that case was the absence of any "suggestion that sampling methods

used in statistical analysis were employed." *Id.* (Here, unlike in *Espenscheid*, the plaintiffs' expert testified that "the sample was large for this type of study, representative, and approximately random" and that "the study used 'accepted procedures in industrial engineering.'" Pet. App. 13a.) Yet another complication in *Espenscheid* was that some workers allegedly underreported their time not because of impermissible pressure from the employer "but because [they] wanted to impress the company with [their] efficiency." 705 F.3d at 774. These myriad issues presented variations among class members on a different order of magnitude from differences of a few minutes walking to a work station.

The non-wage/hour cases Tyson cites in which class certification was denied likewise presented dramatic variations among class members. *McLaughlin* reversed class certification of smokers' fraud claims against cigarette manufacturers where "individual smokers would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation." 522 F.3d at 228. *Broussard* reversed class certification of franchisees' breach-of-contract claims where "franchisees' contractual rights and obligations differ; [the franchisor] directed different representations to different franchisees; franchisees relied on these representations in a different manner or to a different degree; each franchisee's entitlement to toll the statute of limitations is fact-dependent; and the profits lost by franchisees also differed according to their individual business circumstances." 155 F.3d at 343.

In the two asbestos cases Tyson cites, the Fifth Circuit reversed trial plans — not class certification

— because (among other problems) the contemplated use of representative proof was contrary to specific state-law restrictions on inferring causation as to groups from causation as to individuals. *Cimino*, 151 F.3d at 313; *Fibreboard*, 893 F.2d at 711-12. By contrast, here the FLSA claim and the state wage/hour claim were substantively the same and subject to the same "terms of proof." Pet. App. 5a n.2. An additional problem in *Cimino* was that the trial plan did not provide the juries with the opportunity to determine whether defendants' products were the causes of even the sample plaintiffs' medical conditions. 151 F.3d at 305, 315. And in *Fibreboard*, the diverse class "consist[ed] of persons claiming different diseases, different exposure periods, and different occupations." 893 F.2d at 710. These types of differences are on a different scale from the minor variations at issue in this wage/hour case.

Finally, Tyson's claim that the decision below conflicts with *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), is incorrect. First, that case, like this one, *affirmed* the certification of a class. See *id.* at 1162-63. Second, that case, like this one, *endorsed* the use of "statistical sampling and representative testimony." *Id.* at 1167. Although the court in *Jimenez* stated that such techniques are not acceptable for determining damages, *id.*, that statement is pure dicta because the district court in that case had not yet identified the means of determining damages, *id.* at 1164. In fact, as noted, this Court's decision in *Mt. Clemens* permitted the use of representative proof regarding damages where an issue — such as the amount of time it takes to perform a particular task — can be the subject of reasonable inferences based on common proof. This

Court does not grant review to correct stray dicta, much less dicta in opinions *other* than the one on which certiorari is sought.

Because Rule 23 provides a context-specific standard, not a rule, it is unsurprising that different facts yield different results. None of the decisions Tyson cites conflicts with the decision below.

C. The Court does not grant review to second-guess facts found in the lower courts, particularly where, as here, ample evidence supported the verdict.

Without a circuit conflict, Tyson is left with a run-of-the-mill challenge to the sufficiency of the evidence in a case where both the trial court and the appellate court agreed that the jury's verdict was permissible. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)) (internal quotation marks omitted); *see generally United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the decision below was correct to hold that "[t]he evidence is susceptible to the reasonable inference that the jury's verdict is correct." Pet. App. 13a (citation, internal quotation marks, and source's alteration marks omitted). As the court of appeals explained, the sample used to determine average times consisted of hundreds of employees, and plaintiffs' expert testified that it "was

large for this type of study, representative, and approximately random" and "used 'accepted procedure in industrial engineering.'" *Id.* Tyson admitted that a significant amount of overtime was being performed and that K-code time did not include the donning and doffing of all protective equipment, and damages were awarded based not only on representative donning, doffing, and walking times but also on individual timesheets. *Id.*[4]

II. The Question Whether A Class Must Show That All Its Members Sustained Injury Does Not Warrant Review.

A. The question was not decided below.

Regarding Tyson's argument that the class should be decertified because not all of its members suffered injury, the court of appeals expressed concern that Tyson had exaggerated the authority for its position. *Id.* at 9a. Ultimately, however, the court declined to decide the question, finding that Tyson's own requested jury instruction had invited the error. *Id.* at 10a.[5] Tyson does not argue that the correctness of

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[4] The Court should reject the attempts of various amici to introduce additional issues not presented by this case, such as the standard for certifying issue classes (which the district court did not do) or whether *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), forecloses class certification where individual class members have sustained different amounts of damage (which *Tyson* does not argue here and did not argue below). *See* Br. Amicus Curiae [sic] of the Equal Employment Advisory Council 16-20 & nn. 2-3 (raising these issues).

[5] Tyson's characterization of the court of appeals as having "provided no further analysis or explanation" of its views after remarking on Tyson's exaggeration, Pet. 13, is thus incorrect: as Tyson later acknowledges, *id.* at 29-30, the Court rejected the argument as invited error, Pet. App. 10a.

the appellate court's finding is a question that merits review, nor does Tyson include a challenge to that ruling as a question presented. Rather, Tyson addresses the invited-error argument only as an afterthought in a single paragraph of the petition. Pet. 29-30.

As to Tyson's question presented, because this Court is "a court of final review and not first view," it ordinarily "do[es] not decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations and internal quotation marks omitted); *accord Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). There is no reason to depart from that procedure here. If, as Tyson avers, the question is important and recurring, Pet. 30-32, it will surely arise again in a case that properly presents the issue. Tyson's suggestion that the issue rarely reaches the courts of appeals, *id.* at 31, is belied by the nine appellate cases Tyson cites discussing the issue, *id.* at 26-28 & n.9.

B. The claimed circuit split is illusory.

Tyson's claim that the circuits are divided over the inclusion of uninjured persons in certified classes fails in any event. Tyson is correct that some circuits have held that a class need *not* show, as a prerequisite to certification, that *all* class members necessarily suffered injury. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 21-22 (1st Cir. 2015); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009), *cited at* Pet. 26. In support of their view, these decisions point to (among other things) the infeasibility of assessing standing before all class members are identified and other safeguards against

recovery by uninjured class members. *See Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677. These decisions also have strong support from this Court's repeated recognition that Article III does not require that all plaintiffs have standing. *See, e.g., Horne v. Flores*, 557 U.S. 433, 446-47 (2009); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

On the "other side" of Tyson's supposed conflict are a handful of statements that were neither accompanied by analysis nor outcome-determinative. First, Tyson quotes the statement in *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that all class members must have standing. *Id.* at 264. However, that case neither gave an affirmative reason for that requirement nor explained why courts must assess the standing of each individual unnamed class member despite this Court's general rule that courts need not consider standing as to each named plaintiff even in a non-class action. In any event, in *Denney* the court found that the class had standing, so its statement did not determine the outcome. *See id.* at 265-66.

Next, Tyson cites *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012), but that case said even less: it merely quoted one sentence from *Denney*, then held that the class at issue had standing. *Id.* at 594-95. Moreover, the Ninth Circuit has repeatedly applied the opposite rule, including once en banc: "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *accord*

Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011); *Fleming v. Pickard*, 581 F.3d 922, 924 n.3 (9th Cir. 2009).

In re Deepwater Horizon, 739 F.3d 790 (5th Cir.), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014), which Tyson cites in a footnote, also does not help Tyson. In that case, the Fifth Circuit expressly declined "to choose whether *Kohen* or *Denney* articulated the correct test." 739 F.3d at 802. The cases the Fifth Circuit cited in support of the *Denney* view were *Denney* itself, *Mazza*, and cases from the Seventh and Eighth Circuits, *see id.* at 801 & nn. 27-29, which Tyson concedes do *not* require proof that 100% of class members were injured, Pet. 27, 29.

Tyson mischaracterizes the holding of *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013). In that case, the court's concern about whether the class contained uninjured members did not, as Tyson implies, lead the court to reject class certification. Rather, the court's discussion of uninjured class members arose in the context of deciding whether to hear an interlocutory appeal of class certification under Rule 23(f). *See id.* at 250-54. The court exercised its discretion to hear the appeal based on several factors, including the fresh guidance that this Court had provided five months earlier in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The court's ultimate disposition on the merits was merely a remand for reconsideration in light of *Behrend* to consider possible flaws in the class's damages model — *not* a holding that the presence of any uninjured class member defeats certification. *See* 725 F.3d at 255 ("Mindful that the district court neither considered the damages model's

flaw in its certification decision nor had the benefit of *Behrend*'s guidance, we will vacate class certification and remand the case to the district court to afford it an opportunity to consider these issues in the first instance. We need not reach the defendants' alternate grounds for relief." (citation omitted)).

The Court does not grant review based on a "mere[] inconsistency in dicta or in the general principles utilized." Shapiro, Geller, et al., *Supreme Court Practice* § 4.3, at 241 (10th ed. 2013). Moreover, for a conflict to be worthy of resolution by this Court, it should be "[w]ell-[d]eveloped," and review of the question should not be taken where it "requires 'further study' in lower courts." *Id.* § 4.4(b), at 247 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari)). Here, several courts have held, consistent with this Court's approach to standing and based on fully articulated reasoning, that a class need not verifiably consist of only injured members in order to be certifiable. The cases Tyson cites for the contrary view have not analyzed the question. Moreover, Tyson does not point to any case in which class certification was actually precluded because of the class's failure to prove, at the outset of the case, that 100% of class members sustained injury. Thus, even if this case properly presented the question (which it does not), review would be unwarranted.

Finally, this case presents no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members. The jury was instructed to base its award only on amounts it found to be owing to class members who had not received full compensation. Pet. App. 10a ("[T]he jury was instructed, 'Any employee who has

already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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REPLY BRIEF

Plaintiffs' Opposition is notable for what it does not contain: a defense on the merits to the questions presented in Tyson's Petition. They cite nothing in Rule 23 or this Court's cases that allows a court to certify a class on the premise that liability and damages will be determined with statistical techniques that presume that all class members are identical to the average of a sample of disparate class members—indeed, Plaintiffs offer no substantive defense of "averaging" at all. Plaintiffs similarly cite no authority that allows a class to be certified and to obtain a judgment when it includes hundreds of members who were not injured and would receive zero damages in an individual lawsuit.

Instead, Plaintiffs assert that Tyson failed to preserve these objections, and they attempt to recast their case as a straightforward wage-and-hour class action in which liability and damages were proved using "representative evidence" in accordance with *Anderson* v. *Mt. Clemens Pottery*, 328 U.S. 680 (1946). Both claims are incorrect.

Tyson repeatedly opposed class certification and moved to decertify on the same grounds raised in the Petition, and it renewed those arguments on appeal. And *Mt. Clemens* did not adopt any "special rule for wage/hour cases," Opp. 1, that allows plaintiffs to obtain damages with evidence of the amount of time worked by a fictional "average" employee derived from a sample of employees who performed *different* tasks consuming admittedly *different* amounts of time. Yet that is precisely what a divided Eighth Circuit panel allowed Plaintiffs to do here, contrary to the decisions of several other circuits.

The Eighth Circuit further erred by affirming class certification and a multi-million judgment even though the class contains hundreds of members who were not injured and are not entitled to any damages. That decision exacerbates two circuit splits and conflicts with *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013).

The seven amicus briefs filed in support of Tyson's Petition attest to the important and recurring nature of the questions presented. This Court should grant certiorari to resolve the lack of clarity in the law that has permitted plaintiffs to obtain certification of classes with uninjured members and to use extrapolation and averaging to elide significant differences among class members that should preclude classwide adjudication of their claims.

I. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS BASED ON EXTRAPOLATION AND AVERAGING, IN CONFLICT WITH OTHER CIRCUIT COURTS.

1. Tyson preserved its objection to class certification based on "statistical techniques that presume all class members are identical to the average observed in the sample." Pet. (i). Tyson opposed the motion for class certification, moved to decertify the class after this Court decided *Wal-Mart* v. *Dukes*, and renewed the motion to decertify at the close of Plaintiffs' case and again post-trial. Pet. 6–8, 11–12. After the district court rejected Tyson's arguments on the merits, *id.* at 8–9, 11–12, Tyson raised them to the Eighth Circuit panel, which rejected them on the merits, and in a petition for rehearing en banc, which was denied 6–5, *id.* at 12–15.

Plaintiffs dispute none of that. Instead, they attempt to rewrite the first question presented as an objection to the use of "representative proof"; Plaintiffs then claim that Tyson "waived" that objection, Opp. 6, by requesting a jury instruction that if plaintiffs "prove that the employees have in fact performed work for which they were not paid," they may prevail if they "produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference." Doc. 151, at 41 (proposed instructions); Doc. 277, at 16 (actual instructions). But the Eighth Circuit identified no "waiver" and "passed upon" the merits of Tyson's arguments. See Pet. 12–13. Moreover, this jury instruction has nothing to do with "representative proof"; it refers to the manner in which a plaintiff who has proven liability and the certainty of damages may then quantify such damages. It did not concede the propriety of "averaging."

In fact, Tyson is challenging "trial-by-formula"—the use of averaging and extrapolation to ignore individual differences among class members and manufacture supposedly "common" questions by presuming that each class member is identical to a hypothetical "average" observed in a sample. There is no dispute that a court may permit the use of "representative proof" at trial to prove a common question—*i.e.*, one where "determination of its truth or falsity" as to one class member fairly may be deemed to answer the question for other class members "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. But here, there is no such commonality among class members: they indisputably perform different jobs and wear different combinations of personal protective equipment that take significantly different amounts of time to don and doff. Pet. 5–7, 9–10, 16;

Pet. App. 137a–138a. These dissimilarities within the class "impede the generation of common answers," *Wal-Mart*, 131 S. Ct. at 2551 (quotation omitted), because proof of the donning/doffing time of one class member is not proof of the donning/doffing time of other class members who wear different equipment. And proof of the *average* time observed in a sample of class members who wear varying combinations of personal protective equipment is not proof of the time it takes *any* class member to don/doff particular equipment, let alone proof of which class members worked unpaid overtime. See Pet. 16–19.

Tyson's dispute is thus not with the concept of representative proof. It is with the use of averaging to avoid differences among class members that require individualized inquiry and preclude class certification. That is a legal issue to be decided by the court, not the jury. Tyson repeatedly raised the legal objection that Plaintiffs were seeking, in the Seventh Circuit's words, to "get around the problem of variance" by using averages extrapolated from a sample of disparate class members. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013). As the Seventh Circuit recognized, such averaging is not the type of "genuinely representative evidence" that can provide the classwide proof of liability and damages necessary to support class certification. *Id.* at 774–75. Instead, such averaging necessarily confers a "windfall" on some class members and "undercompensates" others. *Id.* at 774.

2. The Eighth Circuit's decision is thus in direct conflict with *Espenscheid*. But the split does not end there. As we demonstrated, Pet. 19–24, the Second, Fourth, Fifth, and Ninth Circuits also have held that a class may not be certified where liability and/or

damages are based on averages extrapolated from a sample of disparate class members.

Plaintiffs say the decisions from other circuits "involved much greater variation" among class members than the "few minutes" of donning/doffing time at issue here. Opp. 11. But Plaintiffs brought this suit because, as their counsel told the jury, the difference between the 4–8 minutes of K-Code time Tyson paid depending on the job and the 18–21 minutes Plaintiffs sought was "significant." Tr. 21. Moreover, their expert admitted that a small difference in minutes substantially reduced the number of injured employees and the amount of damages to the class, *compare* Apdx.00869, *with* Apdx.00871 (if one assumes that all class members spent 15 minutes/day on donning/doffing instead of 18–21 minutes, there are 110 fewer injured class members and damages are reduced by more than $1.78 million).

More fundamentally, the reason a class may not be certified where liability or damages are based on extrapolation from a sample of disparate class members applies regardless of whether the difference between class members is extensive or relatively small: The use of averaging alters substantive rights. Instead of proving that the defendant's conduct actually harmed *him*, a plaintiff can recover by showing the harm the defendant's actions inflicted on some *hypothetical* "average" class member. See *Broussard* v. *Meineke Disc. Muffler Shops*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing class certification where plaintiffs substituted expert testimony based "on abstract analysis of 'averages,'" for "proof of individual damages"). The trial focuses on "the testimony of experts regarding [class members'] claims, as a group," instead of "individual causation"

and "discrete injury" to individual class members. *In re Fibreboard Corp.*, 893 F.2d 706, 711–12 (5th Cir. 1990). As a result, "the discrete components of class members' claims" and defendants' "defenses [are] submerged." *Id.* at 712; see also *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (affirming class certification where the district court rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase, and bifurcated the proceedings to preserve "Allstate's due process right to present individualized defenses to damages claims"), *petition for cert. filed*, 83 U.S.L.W. 3638 (Jan. 27, 2015) (No. 14-910)[1]; *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (when averaging "is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation").

That is what happened to Tyson. Pet. 23. Tyson could not raise defenses to individual claims and was reduced to attacking the methodology plaintiffs' expert used to create the average donning/doffing times. That would not have been permitted in the Second, Fourth, Fifth or Seventh Circuits.

3. Plaintiffs cannot avoid that conclusion by claiming that different principles apply to wage-and-

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[1] *Jimenez*'s rejection of sampling to prove damages cannot be dismissed as "pure dicta," Opp. 13, because it was central to the court's rejection of Allstate's argument that class certification on the question of liability "violated Allstate's due process rights," 765 F.3d at 1166. As we explained, Pet. 21 n.3, Allstate seeks review of the Ninth Circuit's decision because it allowed plaintiffs to prove classwide liability through sampling. Because the Eighth Circuit allowed Plaintiffs to use sampling to prove both classwide liability and damages, Tyson's Petition should be granted, or at least held, if the Court grants Allstate's petition.

hour class actions. *Mt. Clemens* does not create any "special rule" for wage-and-hour cases, Opp. 1, 7–10, that justifies class certification here or how the class claims were proved here. *Mt. Clemens* held that an employee who sues for "unpaid overtime compensation" under the FLSA has "the burden of proving that *he* performed work for which he was not properly compensated," and he additionally must produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 686–87 (emphasis added).

Nowhere does *Mt. Clemens* say that an employee can prove that *he* worked unpaid overtime based on an average derived by looking at time worked by *other* employees who performed different jobs that admittedly took different amounts of time to perform. See, *e.g.*, *Grochowski* v. *Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (testimony that co-worker generally worked with plaintiff, but did not always do so because "'people rotated,'" is insufficient to award the co-worker damages for unpaid overtime); *Reich* v. *So. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (evidence that employees in some departments were denied lunch breaks does not support award of damages to employees in other departments who did not miss breaks). Even though there are a number of ways to estimate the amount of an employee's unpaid overtime, the average of a sample of employees who performed different tasks and worked different amounts of unpaid time "can't support an inference about the work time of thousands of workers." *Espenscheid*, 705 F.3d at 775.[2]

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[2] Plaintiffs repeat the Eighth Circuit panel majority's assertion that Mericle's time study was "'representative, and approximately random.'" Opp. 15 (quoting Pet. App. 13a). Mericle admitted at trial, however, that his study was not a

II. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS THAT INCLUDES UNINJURED CLASS MEMBERS, IN CONFLICT WITH OTHER CIRCUIT COURTS.

This Court should also grant review to resolve a second question that has divided the circuit courts: whether a class may be certified when it includes hundreds of members who were not injured and would have no claim to damages in individual lawsuits.

1. Plaintiffs urge the Court to deny review because the Eighth Circuit declined to address this question. Opp. 15. Tyson did, however, press the argument in the Eighth Circuit, and it was a principal part of the dissents from the panel opinion, Pet. App. 22a–24a, and the denial of rehearing en banc, *id.* at 122a–127a. There is no bar to this Court's review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (grant of certiorari precluded "only when 'the question presented was not pressed *or* passed upon below'") (emphasis added).

There is, moreover, no support for Plaintiffs' contention, Opp. 12, that Tyson invited the jury to treat class members with no injury as members of the class by requesting an instruction that the jury could

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'random sample." Tr. 913. As we demonstrated, Pet. 10, Mericle did not select workers from a variety of jobs or ensure that his sample had the same proportion of knife and non-knife wielding employees as in Tyson's workforce. But even if the sample were collected in a statistically sound manner, the average time still would not be a just and reasonable inference of the donning/doffing time of any employee because the average is based on employees in different jobs who wore different equipment that took different amounts of time to don and doff. *See Espenscheid*, 705 F.3d at 775.

not award damages for any employee that already received full compensation. When the district court rejected Tyson's request to decertify the class and allowed the case to proceed to trial, Tyson had every right to request that Plaintiffs "be held to their evidentiary burdens of proof," Pet. App. 20a (Beam, J., dissenting). That request invited no error. The jury does not decide who is in the Rule 23 class and the FLSA collective action. The class is defined by the *court* and is composed of individual employees who responded to the court-ordered notice by opting into the FLSA collective or declining to opt out of the Rule 23 class.

2. Nor does this Court's precedent allowing a court to decide a constitutional challenge as long as at least one plaintiff has standing to sue support the Eighth Circuit's affirmance of class certification in an action for damages when a class includes members with no claim to damages in their own right. Opp. 17. If a court determines that a statute is unconstitutional, it will enter declaratory and injunctive relief regardless of whether the lawsuit was brought by one plaintiff or many, and that relief may incidentally benefit nonparties and individuals who would not have standing to sue. But that is not the case in an action for damages. A defendant should not be compelled to pay damages to those who are not injured, and persons with no injury should not become entitled to relief by joining their claims with others who are. Such a result would allow the procedural device of a class action to alter substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2702, and transgress Article III limitations on judicial power.

3. Plaintiffs' attempt to explain away the confusion in the circuit courts on this question also fails.

a. Plaintiffs assert, first, that there is no real circuit split because there are decisions in several circuits (notably the Seventh, Eighth, and Ninth) on both sides of the issue. Opp. 17–18. But that serves only to confirm the confusion, not to dispel it. See Pet. 25–30.

b. Plaintiffs next attempt to discount the D.C. Circuit's insistence in *In Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013) that plaintiffs must show injury to all class members as a prerequisite to obtaining class certification. Plaintiffs claim the D.C. Circuit made that statement "in the context of deciding whether to hear an interlocutory appeal" of the class certification order. Opp. 18–19. But after deciding to grant the petition for interlocutory review, the D.C. Circuit turned to the *merits* of the class certification ruling and expressly criticized the district court's reliance on *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), and its willingness to certify a class that includes persons who may not have been injured, *In re Rail Freight*, 725 F.3d at 254–55. Moreover, the reason the D.C. Circuit vacated the class certification order and remanded for the district court "to consider possible flaws in the class's damages model," Opp. 18, was because the model was "essential to the plaintiffs' claim they can offer common evidence of classwide injury," *In re Rail Freight*, 725 F.3d at 253.

4. This case presents the Court with an opportunity to resolve that conflict because the Eighth Circuit not only affirmed certification of a class that contains uninjured members, it also affirmed a nearly $6 million class judgment. Plaintiffs say there is "no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members,"

Opp. 19, but the only authority they cite is the jury instruction advising the jury not to award damages for employees who were fully paid. The judgment, however, does not say uninjured class members will not share in the recovery; it says nothing about how the award will be distributed. Pet. App. 125a–126a (Beam, J., dissenting). Nor, tellingly, do Plaintiffs propose any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured and to limit recovery to them. *Id.* at 27a, 125a. There is just "a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 24a.

CONCLUSION

The Petition should be granted.

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RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. They support the petition in this case because they have a strong interest in ensuring that the lower courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The organizations that are signatories to this brief include:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of

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[1] Pursuant to Sup. Ct. R. 37.2(a), counsel for all parties received notice of *amici*'s intent to file this brief 10 days before its due date. All parties have filed blanket consent letters with the clerk of court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

Retail Litigation Center, Inc. ("RLC"). RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the

potential industry-wide consequences of significant pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere paper requirements that can be brushed aside when useful for streamlining litigation. Instead, they are crucial safeguards grounded in fundamental notions of due process essential to protecting the rights of both defendants and absent class members. *See* 28 U.S.C. § 2072(b); *see also Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Accordingly, before the named plaintiffs in any case may take advantage of the class-action device, they must establish that the putative class members' claims present at least one "common question[]" that, if adjudicated on a classwide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, named plaintiffs who seek certification under Rule 23(b)(3) must satisfy the "even more demanding" requirement of proving that common questions "predominate" over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

Unfortunately, there is an alarming trend of lower courts that, in violation of this Court's precedents, have failed to enforce Rule 23's essential requirements. The courts below are part of that trend. They relaxed the requirements for class certification in at least two respects: *First*, the Eighth Circuit affirmed the district court's certification decision, even though the certified class

includes a significant number of individuals who were concededly not injured by the defendant's conduct and, therefore, do not have standing under Article III of the U.S. Constitution. *Second*, the Eighth Circuit concluded that Rule 23 allows class adjudication of liability based on a statistical sampling model that calculates an "average" class member's time spent donning and doffing protective equipment in the workplace and imputes that calculation to every single class member.

As the petition explains, the lower courts' decisions not only violate this Court's precedents, including its recent decisions in *Comcast* and *Wal-Mart*, but they also deepen entrenched divisions in lower court authority over the requirements for class certification. The fact that lower courts continue to disobey this Court's precedents calls for immediate corrective measures.

This Court's review is especially appropriate in this case, for it raises the critical and recurring issue of whether averaging and extrapolation techniques may be used to support a large class action, even when there are significant differences between the individual class members. Specifically, this case involves petitioner's purported failure to compensate employees for time spent donning and removing work equipment. The merits of those claims, brought on behalf of over three thousand employees, depend on the particular work responsibilities and individual circumstances of each employee. The evidentiary record below was clear that there were substantial variations in the protective gear worn by employees and the time associated with donning and removing

that gear. Nonetheless, the district court, as affirmed by the Eighth Circuit, held that the significant differences were immaterial for purposes of class certification and ascertaining classwide liability. In the lower courts' view, because plaintiffs developed a statistical analysis calculating the "average" time spent donning and doffing the protective equipment, that statistical average could be assigned to each employee, notwithstanding any employee's actual individualized and personal circumstances. This use of statistical averages to gloss over fundamental differences between individual claims is a pristine example of the type of "Trial by Formula" deemed impermissible by this Court, *see Wal-Mart*, 131 S. Ct. at 2561, and an inadequate substitute for the sort of individualized liability determinations that are required when individual claimants have very different factual circumstances, as is the case here. The courts below further compounded this error by certifying the class even though a significant number of the class members had no cognizable harm to support Article III standing.

If the decision below is allowed to stand, Rule 23's essential safeguards and the minimum requirements for Article III standing will be significantly eroded. And it may send an unfortunate signal that this Court is unwilling to enforce its precedents and ensure that Rule 23's requirements are properly observed. This case thus presents an excellent opportunity for the Court to resolve existing splits in lower court authority, to address ongoing abuses in class-action litigation, and to restore proper

constitutional limits on lawsuits involving individuals who have suffered no injury.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for at least three reasons: *First*, there is a deep split in authority over whether a class may be certified and found to properly satisfy Article III standing requirements where the class includes members who were not injured. *Second*, there is another split in authority that must be reconciled over the appropriateness of certifying a class and assigning classwide liability based on statistical sampling that applies an average value to all class members even though many individual class members may differ significantly from the calculated average. *Third*, the questions presented are important and recurring.

I. The Court Should Grant Review To Clarify That The Class Action Device Cannot Be Used To Circumvent Article III's Standing Requirements.

It is well established that part of the "irreducible constitutional minimum of standing" required under Article III of the Constitution is an "injury-in-fact—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). It is equally well established that standing "is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and that a plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought."

Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)).

Rule 23 does not eliminate these essential constitutional safeguards. Instead, as this Court has recognized, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem*, 521 U.S. at 612–13. Rule 23 thus protects the rights of both defendants and absent class members by ensuring that the innovation of aggregating claims and dispensing with individual litigation is deployed only when it is consistent with the rights of all concerned. *See Taylor*, 553 U.S. at 901 (Rule 23's "procedural protections" are "grounded in due process").

Recognizing that class actions are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979), this Court has held that aggregating individual claims for resolution in one stroke is impermissible if it endangers either the right of absent class members to press their distinct interests or the right of defendants "to present every available defense." *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 to be entitled to litigate their claims through the procedural device of a class action. *Comcast*, 133 S. Ct. at 1432 (quoting

Wal-Mart, 131 S. Ct. at 2551). That is especially important in the context of Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614 (internal quotation marks omitted). Rule 23(b)(3) imposes special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432.

Rule 23(b)(3)'s "demanding" requirement that common questions predominate over individual ones, *Amchem*, 521 U.S. at 623–24, works in tandem with Rule 23(a)'s commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation," *id.* at 623. The requisite cohesion exists when all class members "possess the same interest and *suffer the same injury*." *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added; internal quotation marks omitted); *see also Wal-Mart*, 131 S. Ct. at 2551 ("[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The need to prove predominance by establishing a common, classwide injury protects both defendants and class members by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21; *see also Comcast*, 133 S. Ct. at 1434 (plaintiff must offer "a theory of liability that is capable of classwide proof").

Because class members must suffer the same injury, it follows that for a class to be certified, each member also must satisfy the minimum requirements of Article III standing—that is, each class member must have suffered an injury in fact that is traceable to a defendant and likely to be redressed by a favorable decision. *See, e.g., Amchem*, 521 U.S. at 612–13. The named plaintiffs and absent class members cannot have suffered the "same" injury, as this Court's precedents dictate, if some class members suffered no injury at all.

Those requirements for class certification were not met here as a significant number of class members did not suffer any cognizable injury. Plaintiffs' damages expert acknowledged that there were 212 members of the class who suffered no injury at all because they did not work any unpaid overtime even under the assumed calculated averages. *See* Pet. 11. Moreover, as Judge Beam explained in his dissent, the jury awarded plaintiffs less than half the damages they requested, indicating that the jury discounted the average time spent donning and donning protective equipment calculated by plaintiffs' experts, and that even more class members may have suffered no discernible harm. *See* Pet. App. 125a. Indeed, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.*

Nonetheless, as the petition explains, the decision below joins the First, Third, Seventh, and Tenth Circuits—in square conflict with decisions from the Second, Ninth, and D.C. Circuits—in concluding that a class comprising non-injured

individuals may be certified under Rule 23. *See, e.g.*, Pet. 26–29 (citing cases and describing circuit split). The rule is perhaps best summarized by the Seventh Circuit: "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009).

In its decision, the Eighth Circuit ignored the fundamental circuit split on this issue and claimed that petitioner "exaggerates the authority for its contention." Pet. App. 9a. The Eighth Circuit also claimed that petitioner "invited" the error by requesting the following jury instruction: "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." *Id.* at 10a. But the court's reasoning disintegrates on scrutiny. As the petition and Judge Beam's dissent both explain, petitioner opposed class certification at every stage, thereby preserving any rights on appeal. Pet. 30. Upon having its objections to class certification rejected by the district court, petitioner merely requested that plaintiffs be required to meet their evidentiary burdens as to issues of liability and damages. *Id.* By no means did petitioner waive its objections concerning the lack of standing by numerous members of the formed class.

The lower courts' troubling approach to class certification—allowing some class members to proceed with claims they do not possess on the assumption that some *other* class members have been injured—impermissibly enlarges class members'

substantive rights, *see* 28 U.S.C. § 2072(b), and ignores basic Article III standing requirements. The issue of class member standing is a recurring and exceptionally important issue that desperately needs this Court's guidance.

Moreover, although the Court has thus far declined to grant certiorari to resolve this entrenched circuit split, there is no reason to allow the conflict in lower court authority to percolate. Instead, the Court should take the opportunity presented by this case to establish a single, nationally uniform rule that a district court may not certify a class that contains numerous members who lack Article III standing.

II. The Court Should Grant Review To Clarify That Statistical Averaging Cannot Be Used To Support Class Actions At The Expense Of Individualized Inquiries.

This case also provides an excellent opportunity to resolve existing circuit splits and provide much-needed guidance to the lower courts about whether statistical sampling techniques may be used to support formation of a class notwithstanding significant differences among individual members that would otherwise preclude class certification. As the petition explains, by allowing a class to be formed in such circumstances, the decision below violates *Comcast* and *Wal-Mart* and deepens a yawning divide in lower-court authority over the meaning of those decisions. Pet. 22–26.

In *Comcast*, this Court clarified that lower courts must ensure that a plaintiff's damages evidence does not operate to sweep away individualized defenses

that a defendant may have to each individual class member's claim. For that reason, aggregate damages models that determine the average impact to the average class member are impermissible. Indeed, those types of models are constitutionally suspect because they sweep away individualized damages issues and transform Rule 23's "procedural device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007).

Wal-Mart similarly made clear that liability and damages determinations cannot be derived from formulaic statistical techniques that gloss over key factual elements and come at the expense of individualized proceedings. Rejecting this so-called "Trial by Formula" approach, the Court reversed class certification where "[a] sample set of the class members would be selected," and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561.

Lower courts have shown widespread reluctance to comply with this Court's clear instructions. Several lower courts have all but rejected the holdings in *Comcast* and *Wal-Mart* that individualized liability and damages issues can overwhelm common questions and defeat predominance. As the petition explains, the decision

below joins the Tenth Circuit—in direct conflict with decisions from the Second and Fourth Circuits—in concluding that a class may be certified on the basis of a model that derives a statistical average across the class and imputes that calculated average to each individual class member. Pet. 16–17, 19, 24; *see also* Pet. 20–21 (noting that the Second, Fifth, and Ninth Circuits have cautioned against statistical averaging and extrapolation). This statistical averaging approach ignores the distinct claims of the individual class members and instead replaces that essential inquiry with a single computation reflecting the hypothetical "average" class member who often bears little resemblance to the individual claimants themselves.

The decisions below and their reasoning are in direct conflict with this Court's mandate that all class members "possess the same interest and suffer the same injury." *East Tex. Motor Freight Sys. Inc.*, 431 U.S. at 403 (internal quotation marks omitted). In this case, the only way to determine whether an individual class member has a viable claim is to separately determine whether the class member actually worked unpaid overtime. Among other things, that requires an individualized accounting of each employee's protective equipment and the time spent donning and doffing this gear rather than a combined average assessment spanning over three thousand employees.

As the petition highlights, there are substantial differences in the protective gear that employees wear based on their job responsibilities and their own individual choices. Pet. 4–5, 9–10. These differences

lead to large variances in the amount of time that each employee spends donning and doffing protective equipment. *See, e.g.*, Pet. 18 (noting that pre-shift donning of equipment in the locker room ranged from 0.583 minutes to 13.283 minutes, and that the post-shift range was 1.783 minutes to 9.267 minutes). In addition, there are other material differences such as where employees don their equipment—some of this activity takes place while the employees are on the disassembly line—and whether employees with setup or teardown responsibilities don/doff their equipment as part of activities that are already included within the employee's compensation. Pet. 10. These are all critical factual issues necessary to assess the merits of the individual claims for overtime compensation by each employee, yet the statistical averaging embraced by the decisions below swept aside these considerations entirely.

The Eighth Circuit in fact acknowledged that "individual plaintiffs varied in their donning and doffing routines," and that applying the statistical averaging approach to "individual overtime claims did require inference," but stated this was "allowable" under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Pet. App. 8a. This Court in *Anderson*, however, did not hold that an inference as to liability may be drawn from a calculated average that has no direct correlation to the time spent by any individual employee. Rather, the Court made clear that an employee seeking compensation for unpaid overtime carries his or her evidentiary burden by proving "he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to

show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

The Eighth Circuit's decision here failed to require any proof of the first prong of this analysis, *i.e.*, whether each of the individual class members performed work for which they did not receive proper compensation. Simply assuming that individuals performed uncompensated work on the basis of a statistical averaging model—rather than assessing the actual amount of donning and doffing time spent by each employee and how much, if any, of this time was uncompensated—is an impermissible "Trial by Formula" that is squarely at odds with this Court's precedents. *See Wal-Mart*, 131 S. Ct. at 2561; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them.").

The Eighth Circuit tried to distinguish the holding in *Wal-Mart* on the grounds that individual "employee time records [were used] to establish individual damages." Pet. 10a. But the mere fact that the court conducted an individualized inquiry as to *part* of the analysis does not cure the deficiencies with its threshold determination of classwide liability based on a formulaic statistical calculation. The serious flaws of this statistical averaging approach—*e.g.*, ignoring the substantial differences in the donning and doffing activities of individual employees and the inability of the petitioner to litigate these "defenses to individual claims" at trial, *Wal-Mart*, 131 S. Ct. at 2561—are not diminished by

the fact that individual timesheets were used to calculate damages at the back-end of the analysis.

III. The Court Should Grant Review Because The Questions Presented Are Recurring And Extraordinarily Important

The Court should also grant review because the questions presented are important, recurring ones that are of great constitutional and practical significance. Nationwide class actions often seek damages for millions (or billions) of dollars even though many class members have never suffered any actual harm. As a result, there is an urgent need for uniform rules and further guidance that can be provided only by this Court.[2]

First, in light of the large number of lower courts that have failed to comply with this Court's precedents, the entrenched circuit splits on standing, liability, and damages issues have spawned a serious problem of forum-shopping. Indeed, commentators opposed to this Court's decisions have urged

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[2] As the number of recent cases raising similar issues in the Rule 23 context demonstrates, these issues continue to arise and further percolation is not necessary, nor would it be helpful in resolving the issues presented in this case. For example, *amici* have filed briefs in support of *certiorari* in *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, 2015 WL 350579 (U.S. Jan. 27, 2015) (No. 14-910); *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed sub nom., Dow Chemical Co. v. Industrial Polymers Inc.*, 2015 WL 1043612 (U.S. Mar. 9, 2015) (No. 14-1091); and *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014) (per curiam), *petitions for cert. filed*, 2015 WL 1201367, 2015 WL 1201368 (U.S. Mar. 13, 2015) (Nos. 14-1123, 14-1124).

plaintiffs to "avoid some of the worst federal case law by filing in circuits that are most receptive to class actions." Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013).

Second, allowing classes on the basis of statistical averaging makes certification (and liability) determinations rest primarily, if not, solely on the basis of expert testimony rather than the factual elements necessary to support a claim. This threatens to transform litigation into a dispute over statistical modeling rather than the facts and the law. As was the case here, defendants in similar class actions will be limited to challenging the underlying methodology used by the experts rather than litigating the factual circumstances of each claim. That improperly precludes class-action defendants from raising "defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561, that are dependent on the unique factual circumstances of each class member.

Third, certifying loosely connected classes (like this one) is not only unfair to class-action defendants, it risks binding absent class members to class-wide dispositions that are substantially divorced from the merits of their individual claims. *Cf.* 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Those interests are particularly acute in cases, such as this one, involving a concocted average member that, by definition, will fail to adequately represent the claims of the many class members that fall above this calculated average.

Fourth, by easing the path to certification, the lower court's approach effectively predetermines a case's ultimate outcome. As this Court has often recognized, certification "may so increase the defendant's potential damages liability and litigation costs" to the point "that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also* Fed. R. Civ. P 23(f) advisory committee notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, *et al.*, *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

It is therefore important for the Court to grant certiorari to ensure that essential requirements of Article III and Rule 23 are respected. *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and]

class actions courts must be more careful to insist on the formal rules of standing, not less so."). Because the courts below did not properly discharge these responsibilities, this Court should grant review to correct their errors, enforce its earlier decisions, and bring clarity to this important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., individually and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013);

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[1] The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. DRI notified respondents' counsel of its intent to file this brief on April 17, 2015, less than the prescribed period; respondents had already graciously provided blanket consent to *amicus* filings, received notice from other *amici*, and sought an extension for their own brief.

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011). DRI's members regularly must defend their clients against proposed class actions in a wide variety of contexts, including the type of wage-and-hour litigation that this case exemplifies.

Too often, those proposed classes fail to satisfy the generally applicable requirements of Fed. R. Civ. P. 23, or the more specific requirements of statutes like the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, for adjudicating the claims of many different persons at once.[2] And once a class is certified, the stakes change dramatically, as defendants' potential exposure increases in direct proportion to the large number of claims to be adjudicated. Erroneous appellate decisions approving class certification have lasting effects on class-action defendants and their counsel, including DRI members: they increase not just the *number* of erroneous certifications, but also the *threat* of erroneous certification, and the attendant cost and settlement pressure. As cost and settlement pressure increase, there are fewer and fewer opportunities to correct those errors in class-certification law. DRI has a strong interest in

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[2] Damages class actions under Rule 23(b)(3) and collective actions under FLSA § 216(b) "are fundamentally different" in some respects, including that persons do not become parties to collective actions unless and until they opt in by "filing written consent with the court." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529-30 (2013). Because the FLSA collective action here is a subset of the putative Rule 23(b)(3) class, the focus of this brief is on the Rule 23 class issues—though the ability to provide simultaneous guidance on the FLSA collective-action issue as well makes this case even more suitable for review.

ensuring that the Court does not pass up the opportunity that this case represents.

SUMMARY OF ARGUMENT

The court of appeals held that this case could properly proceed to trial and judgment for the plaintiffs based on evidence about how much uncompensated overtime pay the "average" worker at a particular food-processing facility is owed. But that fictional everyman is not in the caption of this case or the certified class. Thousands of real workers are. And the record evidence shows that some of them worked no unpaid overtime, but were paid all that they are due under the law. Yet the judgment in this case allows those plaintiffs to recover money for their non-injury from an employer who did not harm them. The Eighth Circuit upheld that judgment, relying on the power of averaging to dissolve these critical differences among the class members. In the process, the court of appeals' decision deprived petitioner of its right to assert every defense it has to each of its workers' claims for unpaid overtime. Unless corrected, the Eighth Circuit's decision threatens to create great mischief in class-action practice.

The Eighth Circuit's decision here is part of a troubling line of cases emerging from the courts of appeals that the Court must abate if its teachings in *Wal-Mart* and *Comcast* are to retain meaning. Among other things, *Wal-Mart* held that a defendant's right to challenge every claim leveled against it cannot be circumvented simply by having the district court's liability determination rest on "Trial by Formula," whereby the defendant's liability would be proved by reference to "[a] sample set of the class

members [that] would be selected," and "[t]he percentage of [the sampled members'] claims determined to be valid would then be applied to the entire remaining class ... without further individualized proceedings." 131 S. Ct. at 2561. Just two years later, in its *Comcast* decision, the Court added that if damages are to be adjudicated on a classwide basis, then they must also rest on classwide, common proof, and cannot be established using an "arbitrary" measure that fails to line up with the theory of liability on which the plaintiffs' case depends. 133 S. Ct. at 1433. The Eighth Circuit's decision abides by neither instruction.

This case purportedly combines, for both liability and damages purposes, an FLSA collective action comprising approximately 400 workers who supposedly are "similarly situated," 29 U.S.C. § 216(b), with a state-law damages action that seeks to combine the claims of more than 3,000 workers under Rule 23(b)(3). *See* Pet. 7. The central contention is that the petitioner failed to pay the class members all the overtime pay they allegedly earned due to time spent donning and doffing protective clothing and walking back and forth between their lockers and the production floor. Pet. App. 2a. Any individual employee wishing to recover damages on that theory must prove "that he performed work for which he was not properly compensated." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

Introducing evidence about how much time each of the 3,000 class members spent donning, doffing and walking (and what if any difference that made to the amount of overtime each worked) would be unworkable. That should have been enough to show that the

workers' claims cannot "productively be litigated at once," *Wal-Mart*, 131 S. Ct. at 2551. But it did not stop the courts below. Instead, the Eighth Circuit held that a judgment in favor of the class may rest on proof only of what the "average" amount of unpaid overtime among the class members is, not of what amounts are due to the individual class members respectively. The Eighth Circuit's decision thus approves the very sort of "Trial by Formula" that this Court disallowed in *Wal-Mart*, and allows a class-wide damages award to rest on an "arbitrary" measure untethered from the theory of liability that was actually tried, contrary to *Comcast*. What is an average if not a formula?

And, when the money is paid out, the fictitious average worker steps aside and the real plaintiffs return. Every one of those plaintiffs gets a share of the money judgment—despite undisputed evidence that many of the workers (hundreds of them, at least) were not owed any overtime pay at all. Storm Lake may not be too far from Lake Wobegon—but here, every plaintiff is deemed precisely average.

Unfortunately, the Eighth Circuit's is not the first decision to allow "average" evidence of this sort to trump a defendant's right to raise every available defense to every class member's individual claims. This Court should make it the last, however, by granting review.

ARGUMENT

I. The Court Should Grant Review To Stop Courts From Averaging Away The Differences Between Class Members' Claims

Formulas are tempting in a class action. Using them can make many knotty problems disappear easily. But as this Court has recognized, federal courts are not free to flatten the obstacles to class certification: those obstacles are there to protect the due process rights of litigants. With increasing frequency, however, some lower courts are disregarding this Court's teaching and once again embracing the promise of easy adjudication by formula. The result is a conflict, and an important one. This Court should step in to resolve it.

In *Wal-Mart*, this Court instructed that the class-certification inquiry should focus on whether there is sufficient commonality—not just in terms of the legal claims involved, but also in terms of how they will be adjudicated—"to believe that all [the class members'] claims can productively be litigated at once." 131 S. Ct. at 2551. Central to that examination, the Court also said, is whether there are "[d]issimilarities within the proposed class [that] ... have the potential to impede the generation of common answers," the whole point of the class-action procedure. *Id.* (citation omitted).

That was the case in *Wal-Mart*: each of the class members there alleged that her supervisor exhibited a pattern or practice of discriminating against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 131 S. Ct. at 2547, 2552. But one form of class relief sought

was backpay, a necessarily individualized remedy, which the employer has the right to contest by showing that, regardless of its alleged pattern or practice, "the individual applicant was denied an employment opportunity for lawful reasons" in her individual case. *Id.* at 2561. Confronted with a plan to "replace such proceedings with Trial by Formula," *i.e.*, extrapolating the defendant's classwide backpay liability from the results of a sample set of claims that would be tried by a master, the Court flatly rejected that "novel project" as inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b), because it would deny the defendant its right "to litigate its ... defenses to individual claims." 131 S. Ct. at 2561.

Wal-Mart thus disapproved efforts to gloss over "[d]issimilarities" between class members on liability issues by using statistical extrapolations or averages to hide them. Soon after, in *Comcast*, the Court applied the same principle to damages issues, holding that where damages are tried on a classwide basis, the measure of damages must track the class's theory of liability; the damages awarded to the class may not be "arbitrar[ily]" based on a statistical model that fails to measure only those losses that are fairly attributable to the allegedly wrongful conduct underpinning the class's claims. 133 S. Ct. at 1433-35. If the class plaintiffs' theory of liability would result in different answers on the damages question for each class member, then their damages are not susceptible of classwide proof and thus cannot be certified for classwide adjudication. Statistical models at best obscure that reality; they cannot change it.

That has not stopped the class-action plaintiffs' bar from trying, however. Despite the Court's teachings

in *Wal-Mart* and *Comcast*, class plaintiffs' lawyers have indeed resorted to an increasingly common tactic: using statistical generalities to disguise significant "[d]issimilarities within the proposed class"—such as differences among class members as to the existence or extent of their respective injuries. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted); *see, e.g.*, William C. Martucci & Ashley N. Harrison, *Using Statistics Effectively in Wage and Hour Litigation: An Employer's Offensive and Defensive Tactics*, THE METROPOLITAN CORPORATE COUNSEL, January 2015,[3] at 14 ("[C]lass litigation and the use of statistics within class litigation have grown increasingly over the last decades...."); Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 468 (2012) (Ghoshray) (noting that "the contemporary class action's certification process ... relies heavily on statistical sampling").

The decision below is one of several recent decisions that encourage that trend—but that are wholly inconsistent about just when sampling may be used. The mirror-image results from two recent appellate decisions illustrate the problem. In another overtime-liability case, the Ninth Circuit upheld the certification of a Rule 23(b)(3) liability class where the plaintiffs proposed to prove liability by relying on "statistical sampling." *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014). The Ninth Circuit's reason for doing so was not based on any case-

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[3] *Available at*: http://www.metrocorpcounsel.com/pdf/2015/January/14.pdf.

specific evaluation of whether that procedure would ensure the defendant's right to challenge its liability to any one of the putative class members. It plainly would not have in that case, because the fundamental liability question—whether a particular worker performed any uncompensated overtime work—is highly individualized, just as it is here. Instead, the court justified its ruling by invoking a per se rule "that statistical sampling and representative testimony are acceptable ways to determine liability." *Id.* (citing *Leyva* v. *Medline Indus., Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013)). The one limitation that the Ninth Circuit recognized was that "the use of these techniques [may] not [be] expanded into the realm of damages." *Id.* Contrast the Ninth Circuit's holding with the Tenth Circuit's recent adoption of a similar, *but diametrically opposed* per se rule. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256-57 (10th Cir. 2014). Citing the *same case* as the Ninth Circuit in *Jimenez*, the Tenth Circuit held that the use of extrapolation techniques is acceptable to decide class-wide *damages, but not liability*—exactly the converse of the Ninth Circuit's holding.[4]

The only thing these per se rules have in common is that they represent failures to carry out the judicial responsibility set out in this Court's recent class-certification cases. This Court required careful consideration *not only* of whether "all [the class members'] claims can productively be litigated at once," but *also* of whether the means proposed for doing so

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[4] Defendants in both *Jimenez* and *In re Urethane* have petitioned for certiorari, *see Allstate Ins. Co.* v. *Jimenez*, No. 14-910; *Dow Chem. Co.* v. *Indus. Polymers, Inc.*, No. 14-1091, and DRI has filed briefs supporting certiorari in both.

fairly preserves the defendant's right to assert every defense it has to each class member's individual claims. *Wal-Mart*, 131 S. Ct. at 2551, 2561. Formulas may do a fine job of achieving the first goal, but they fail even to honor the second, much less to achieve it. No per se rule, such as "sampling is always okay for purposes of establishing liability," exhibits the kind of "rigorous analysis" of both efficiency and fairness considerations that this Court demands. *Id.* at 2551.

Ultimately, the sort of extrapolation that these decisions endorse is no substitute for what this Court has demanded: truly "common" evidence that, when presented, "will resolve [the common] issue that is central to the validity of each one of the [class members'] claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The "Trial by Formula" that *Wal-Mart* disapproved is a predictable result of allowing statistical extrapolation from a sample of class members to be the measure of a defendant's liability in cases, like this one, where the requisite "commonality" of claims is absent. Where significant "[d]issimilarities" divide the class—for example, where some class members are grievously injured while others have suffered little or no harm, or where some class members' claims are subject to good affirmative defenses while others' are not—there is no easy, practicable way of trying every single class member's claim in a single proceeding. In those circumstances, for there to be any hope of efficiently conducting a classwide proceeding, the issues presented to the jury must be simplified for trial purposes, in essence by ignoring certain nuances and being content with "close enough." *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("To create the requisite commonality for trial,

the discrete components of the class members' claims and the [defendants'] defenses must be submerged."). And as the Eighth, Ninth, and Tenth Circuits' decisions demonstrate, relying on averages or sampling is a common means of achieving simplicity, at the cost of obscuring significant variations that may exist between each class member's individual circumstances, and thus also at the expense of the defendant's right to present every available defense to every claim asserted against it.

That approach conflicts not only with this Court's teachings, but with the holdings of other circuits that have correctly recognized that an "aggregate determination" may "not accurately reflect the number of plaintiffs actually injured by defendants and [may] bear[ ] little or no relationship to the amount of economic harm actually caused by defendants," so that relying on that "aggregate determination" would "offend[ ] the Rules Enabling Act." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008); *accord Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (holding that damages could not be resolved on a classwide basis by computing lost profits based "on abstract analysis of 'averages'" calculated for a "fictional 'typical franchisee operation'"). The rule employed in cases like this one would be reversible error in those other circuits.

As a result, decisions like this one conflict not only with this Court's precedents, but with the interpretation of Rule 23 in other federal circuits. The Court should grant review now to ensure that *all* federal courts instead perform the "rigorous analysis" that Rule 23 and this Court's precedents mandate.

II. The Court Should Grant Review To Make Clear That Class Actions Cannot Include Those Who Have No Damages

The Eighth Circuit's decision errs in a different respect, one that follows directly from its willingness to allow the tyranny of averages to override the dissimilarities between the class members' individual claims for unpaid overtime. For not only did class members differ in the amount of uncompensated overtime that they performed, but some members concededly had performed none at all, and thus had no legally cognizable injury under the wage-and-hour laws pursuant to which this case was brought. Examination of time records, for example, reveals that, even using the "average" times for donning, doffing and walking that the plaintiffs' experts relied on, many class members—more than 200 at least—would still not have worked enough hours in the week to be entitled to any overtime pay. *See* Pet. 11.

Nevertheless, as Judge Beam noted in his dissents below, these uninjured workers presumably will receive a share of the money judgment awarded to the class. Pet. App. 22a-24a, 122a-125a. It is difficult to imagine a result that more plainly contravenes both the Rules Enabling Act and this Court's precedents than one that allows persons who are not entitled to any damages award at all to share in the spoils of a multimillion-dollar judgment, simply because they happen to fall within the district court's class definition. *See* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure "shall not ... enlarge or modify any substantive right"); *Wal-Mart*, 131 S. Ct. at 2561; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613

(1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints....").

Unfortunately, the Eighth Circuit's decision is not alone in that regard either. Several other circuits similarly have approved class certification even when the class concededly contains a number of members who have suffered no legally cognizable injury at all. *See, e.g.*, *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (granting class certification despite potential that "most members of the plaintiff class had not experienced" the complained-of product defect); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013), *cert. denied sub nom. Whirlpool Corp.* v. *Glazer*, 134 S. Ct. 1277 (2014) (same).

Just months ago, for instance, a divided panel of the First Circuit upheld certification of a class of brand-name drug purchasers suing over the absence of a cheaper generic drug from the market—even though everyone agreed that the class included some purchasers who would never have bought the generic anyway (*e.g.*, out of brand loyalty). *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 20 (1st Cir. 2015). The panel majority recognized that there must be some means of separating, prior to judgment, these uninjured goats from the putative class of injured sheep, but that none had been proposed. *Id.* at 19. Even so, it dismissed that problem because, in its view, "a certified class may include a de minimis number of potentially uninjured parties." *Id.* at 25. As the dissent noted, however, "de minimis" depends on the denominator. In *Nexium*, it meant that as many as 24,000 people, whose identities were unknown and perhaps

unknowable, had suffered no injury but would be included in the class nonetheless. *Id.* at 35 (Kayatta, J., dissenting).

To be sure, the nonexistence of some class members' injuries is a pesky impediment to adjudicating *all* class members' claims in a single proceeding using common evidence. But that does not mean that such impediments may be "submerged" for the sake of an efficient proceeding. *Fibreboard*, 893 F.2d at 712. Those impediments are more generally known as defenses—individualized defenses showing that particular class members are not entitled to any relief. *See* Ghoshray, *supra*, at 498-99 ("[W]ithin the context of sampling, extrapolation allows a nonplaintiff [class member] to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," but "does not ... allow the defendant a reciprocal opportunity to defend against each absent class member").

This Court has long said that "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Rule 23, and the Federal Rules of Civil Procedure as a whole, does not privilege the efficiency of the proceeding above all other values, including respect for the defendant's due-process right. *See Amchem*, 521 U.S. at 615 (observing that Rule 23(b)(3)'s predominance and superiority requirements are intended to ensure that certification will "achieve economies of time, effort, and expense," "*without* sacrificing procedural fairness" (citation omitted and emphasis added)); Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be con-

strued and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").[5]

Overlooking the presence of uninjured class members, as many courts have been willing to do, is unfair to defendants in yet another respect. It effectively relieves class plaintiffs of their burden to "affirmatively demonstrate [their] compliance with" Rule 23 by "prov[ing] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. All too many recent class-certification decisions ignore that allocation of the burden of proof to the party seeking class certification. The Eighth Circuit here appeared not even to consider it. Pet. App. 8a-10a. Even worse, some court of appeals decisions appear to demand that *the defendant* prove that there is no method of separating out uninjured claimants before the court will vacate the certification order. *See Nexium*, 777 F.3d at 32 ("We also conclude that *defendants have not established* that more than a de minimis number of uninjured consumers are included in the certified class." (emphasis added)). That approach shirks the "rigorous analysis" which this Court has required to decide the fundamental question that Rule 23 poses: whether "all [class members'] claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551.

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[5] The unfairness of certifying a class with dissimilarly situated members of course may also harm Rule 23(b)(3) class members, if they fail to exclude themselves, because the class proceeding will "not allow absent class members to stake claims for injury dissimilar to the representative plaintiff's claimed injuries." Ghoshray, *supra*, at 499.

The Court should take this opportunity to put an end to it.

III. The Class-Certification Issues Presented Here Are Important And Recurring, Yet Also Tend To Evade This Court's Review

Besides the critical importance of the questions presented here for federal-court class-certification practice, there is yet another feature of this case that militates in favor of this Court's review: the comparative rarity of class-certification decisions by federal courts of appeals. Courts are reluctant to take interlocutory appeals, and once a class is certified, litigants are reluctant to litigate to final judgment and appeal rather than settle. The paucity of such decisions sharply reduces the number of cases that can serve as a vehicle for addressing a particular class-certification issue, while also increasing the amount of mischief created when erroneous class-certification decisions by the courts of appeals are allowed to stand.

This Court's general practice has been to allow issues to "percolate" to some degree in the courts of appeals before taking them up. But percolation has its limits. Even for issues that can theoretically recur in every circuit, or in every state and federal appellate court, this Court has never insisted that percolation run through every crevice of the judiciary before granting certiorari. *See, e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661 (2012) (resolving 1-1 circuit conflict).

Extended, unnecessary percolation is particularly inadvisable for class-certification issues. Courts of appeals decide class-certification cases far less fre-

quently than they decide other types of cases. So when a reasoned appellate decision presents a *legal* issue for this Court's review, one that could clarify class-certification practice, this Court should be less inclined to wait for the next case than in some other areas on the docket. *Cf. Harper* v. *Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari) (noting that "I would grant review in this case because not many cases presenting this issue are likely to reach the Courts of Appeals"). Appellate percolation of class-certification issues is slow and difficult, for multiple reasons.

This case is exceptional because it involves an appeal from a class action finally tried to judgment. Class certification is often the critical stage in the life cycle of a class action: "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *accord AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). And when defendants succumb to that "pressure," as they often do,[6] it may

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[6] Indeed, more than one recent study has found that the majority of class actions that are certified for litigation settle thereafter. *See, e.g.*, THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 50 (Federal Judicial Center 2005) ("Certified cases concluded with a court-approved, class-wide settlement 89% of the time...."); Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 341-42 & tbl. 2 (2011) (reporting that

well "prevent judicial resolution of [disputed] issues," *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013), including "class certification—the ruling that [may] have forced them to settle" in the first place. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

It was for these very reasons that Rule 23 was amended to allow discretionary interlocutory review of class-certification orders. *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998). Rule 23(f) appeals, however, have certainly not filled appellate dockets. Most federal courts of appeals in practice are loath to grant review under that Rule. A recent study of all Rule 23(f) petitions filed between October 31, 2006 and December 31, 2013, confirms this. *See* John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) (Beisner *et al.*).[7] It found that "[l]ess than one-quarter of petitions for interlocutory review filed in the last seven years have been granted," a marked decrease from what a 2008 study previously found. *Id.* at 1; *see also* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-84 (2008) (finding that courts of appeals granted only

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certification of litigation class resulted in settlement in 58% of all federal-question cases and 75% of all diversity cases).

[7] *Available at*: http://skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings.

36% of all Rule 23(f) petitions filed before October 30, 2006).[8]

The various courts of appeals also differ considerably, both in the number of Rule 23(f) petitions that they receive, and in the rates at which they accept them. Just three circuits—the Second, Seventh, and Ninth—accounted for nearly 60% of all Rule 23(f) petitions filed during the study period. *See* Beisner *et al.*, *supra*, App. A. Each of those circuits accepted less than 30% of the petitions they received. *See id.* In the circuits where the grant rate is higher, the raw numbers are lower. Circuits accepting petitions at a higher rate such as the Third, Fourth, and Fifth received far fewer petitions: combined, the petitions filed in those three circuits made up only about 12% of the total. *See id.* Even the Fourth Circuit's relative receptivity, for example, translated into only four petitions granted over seven years. Then there are the circuits (including the Eighth Circuit) that receive fewer *and* deny more: the First Circuit, for example, granted only two Rule 23(f) petitions over the entire study period, and the D.C. Circuit only *one*. *Id.* For its part, the Eighth Circuit saw fewer than sixty petitions over the entire seven-year study period; it granted only eight. *Id.*

These metrics demonstrate that the Court should not wait for the class-certification issues this case presents to percolate further before deciding to re-

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[8] The bulk of the decline is driven by a decrease in the number of *defendants'* petitions being accepted: "defendants' petitions were granted far less frequently than during the prior period," but "the grant rate for plaintiffs' petitions dipped only slightly in recent years." Beisner *et al.*, *supra*, at 1.

solve them. Quite simply, the Court may have to wait longer than usual before a different court of appeals decides to tackle these same issues again in a decision suitable for plenary review. And while the Court waits, class-action defendants will be left to deal with the consequences of erroneous class-certification decisions. The worse the circuit precedent, the heavier the settlement pressure on defendants in that circuit, and the fewer the opportunities to correct the circuit's misapplications of FLSA and Rule 23. This Court should not pass up the opportunity this case affords.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, Individually and On Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and Human Resources compliance. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal workplace protection and nondiscrimination laws. In addition, virtually all of EEAC's members conduct business in multiple state jurisdictions and thus are also subject to many different state nondiscrimination and wage and hour laws. As large employers, they represent likely targets of broad-based employment class action litigation in both state and federal courts. Thus, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the proper interpretation and

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amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

uniform application of federal class certification procedural requirements.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

The plaintiffs are current and former hourly employees at Tyson Foods' Storm Lake, Iowa pork processing plant. Pet. App. 1a. In addition to their regular hourly wages, the plaintiffs – who worked either on the "slaughter" or the "processing" floor – received additional pay for donning and doffing activities ("K-Code time"). Pet. App. 26a.

The plaintiffs brought an action in federal court for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and Iowa Wage Payment Collection Law (IWPCL), Iowa Code §§ 91A.1 *et seq.*, accusing Tyson of failing to properly compensate its employees for overtime work. Pet. App. 5a, 26a-27a. Among other things, they claimed that the K-Code times were too low and did not cover the entire period of time needed to don and doff protective gear and to perform related activities. Pet. App. 5a, 27a. They moved to certify a Rule 23(b)(3) class and an FLSA collective action. *Id.*

Tyson opposed the motion, arguing that the claims of individual class members were not capable of

resolution on a classwide basis, pointing out among other things that the types of jobs performed and the protective equipment required varied significantly from person to person. Pet. App. 31a-32a. Rejecting Tyson's arguments, the trial court found Tyson's overall compensation system to be the "tie that binds" the class members' claims, warranting Rule 23(b)(3) certification, as well as conditional certification of an opt-in FLSA collective action. Pet. App. 32a.

After this Court decided *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), Tyson moved to decertify the Rule 23 class, renewing its argument that because the plaintiffs' claims were not capable of classwide resolution "in one stroke," *id.* at 2551, they could not establish commonality. Pet. App. 32a. In response, the plaintiffs produced expert testimony purporting to establish classwide liability and damages based on an estimation of the average time a small sample of employees spent on donning and doffing activities. *Id.* at 22a.

Tyson objected to what it characterized as a "trial by formula" approach to establishing common questions of liability and damages, an approach it argued was squarely foreclosed by *Dukes*. Pet. App. 10a, 11a. The trial court refused to decertify the class, concluding that whether "donning and doffing and/or sanitizing" protective gear "constitutes 'work'" was a question common to the class and susceptible to proof on a classwide basis. Pet. App. 37a.

At trial, plaintiffs' damages expert estimated that classwide damages were $6.6 million for the Rule 23 class and $1.6 million for the FLSA collective class, based on her assumption that every single member worked the purported "average" donning and doffing times. Pet. App. 124a-125a. She conceded, however,

that over 200 class members never worked more than 40 hours in a given work week, and therefore were not entitled to any relief. Pet. App. 22a. Tyson's pretrial motions for decertification and judgment as a matter of law were denied, Pet. App. 30a, and the jury eventually rendered a verdict for the plaintiffs. Pet. App. 27a.

Tyson appealed to the Eighth Circuit, which in a 2-1 ruling affirmed. Pet. App. 1a, 14a, 24a. After its petition for rehearing *en banc* was denied by a 6-5 vote, Tyson filed a petition for a writ of certiorari with this Court on March 19, 2015.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below represents one in a growing number in which class certification was permitted despite serious problems of class member commonality. It is unfaithful to this Court's admonition in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), that in order to satisfy the requirements of Rule 23(a)(2) of the Federal Rules of Civil Procedure, plaintiffs must demonstrate that there exists at least one question common to the class *that is capable of classwide resolution*, meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. It also contravenes important class certification principles clarified by the Court in *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), creating substantial uncertainty for employers – especially in the wage and hour context, in which there continues to be a proliferation of litigation. Accordingly, the petition should be granted and the decision below reversed.

The actions of the lower courts in this case are of particular concern because neither the trial court nor the appeals court majority was troubled by the undisputed fact that hundreds of class members suffered no injury at all, giving rise to serious problems under the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.* Equally troubling, the decision below affirmed Rule 23 class certification on shaky proof of common damages, which rested on a questionable and unscientific sampling model. The manner in which purported classwide damages were calculated deprives Tyson of its right to present individual defenses, and thus also raises constitutional due process concerns.

This Court repeatedly has said that the class action procedure "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)) (quotations omitted); *see also Dukes*, 131 S. Ct. at 2550. To invoke the exception, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast* at 1432.

Despite those straightforward principles, lower courts cannot agree on whether sprawling wage and hour actions involving many disparate claims for relief are suitable for class treatment. *Compare Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014) (affirming class certification), *petition for cert. filed*, No. 14-910 (U.S. Jan. 27, 2015), *with Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013) (reversing class certification). The growing confusion regarding the propriety of Rule 23 class certification in such cases creates substantial uncertainty in an area

of law that is of great importance to the business community. This inconsistency undermines prompt and speedy resolution of individual claims by encouraging aggregation as a means of pressuring corporate defendants to forgo their statutory right to put forth a defense to each claim, being forced instead to settle for strategic reasons.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE DECISION BELOW IS NECESSARY TO SETTLE PERSISTENT QUESTIONS OF CLASS ACTION PROCEDURE THAT ARE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The Eighth Circuit affirmed certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and a collective action pursuant to Section 16b of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216b, despite substantial variations in the liability and damages claims of the individual plaintiffs. Because the decision below disregards the fundamental principles of class action law reinforced by this Court in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), review and reversal is warranted.

Review also is necessary to quell the growing conflict in the lower courts regarding the scope and breadth of *Dukes* and *Comcast*, and how they should govern a trial court's decision to certify a Rule 23 class. Accordingly, this case presents the Court with a timely opportunity to restore balance and consistency to the evaluation of Rule 23 class certification questions generally. In particular, review of the decision below

will allow the Court to resolve ongoing confusion regarding the circumstances under which claims involving highly individualized liability and damages issues – such as the payment of wages – ever are suitable for class treatment under Rule 23(b)(3).

A. *Dukes* And *Comcast* Brought Renewed Rigor To Rule 23 Class Certification Determinations

Federal court litigants seeking class certification generally must satisfy all four prerequisites of Federal Rule of Civil Procedure 23(a), as well as the requirements of at least one subsection of Rule 23(b). Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Pet. App. 135a.

The class action procedure is an exception to the "usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (internal quotation and citation omitted); *see also Dukes*, 131 S. Ct. at 2550. As this Court observed in *Dukes*:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We

> recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

131 S. Ct. at 2551 (citations omitted). Therefore, parties seeking class certification carry the considerable burden of proving every element of Rule 23(a), and trial courts, which must undertake a "rigorous analysis" of the proffered evidence, often will be required to look beyond the pleadings in determining whether the class certification requirements have been satisfied.

In *Dukes*, this Court clarified that Rule 23(a) commonality requires that all class members must have suffered the same injury – not simply a violation of the same statute. For example, "the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." *Id.* Rather, in order for Rule 23(a)'s commonality requirement to be met, the individual class members' claims must rely on a common assertion, such as that they all were subjected to discrimination by the same biased supervisor. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution." *Id.* The Court reasoned:

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within

> the proposed class are what have the potential to impede the generation of common answers.

Id. (citation omitted). *Dukes* thus confirmed that to justify certifying a class, the trial court must be satisfied that the answers to common questions will produce a result that applies to the class as a whole. As one commentator observed:

> In proposing the course correction in *Dukes*, the Court tightened the evidentiary rules for commonality under Rule 23. In moving away from the long held practice of evaluating common questions to address commonality, the Court fashioned procedural rules indexed upon evaluating common answers. This contraction is neither an abrogation of rights nor an attempt to impose hurdles on the path toward justice. Rather, the Supreme Court acted as referee to correct asymmetric influences in class actions. The elegance of statistical modeling may have generated a false sense of precision, while in the process losing the substantive concept of due process. For too long, class certifications mushroomed under the simplified methodology, failing to realize that interpreting statistics to generate a desired outcome is neither legally permissible nor ethically desired.

Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 509 (2012).

This Court reinforced those principles in *Comcast Corp. v. Behrend*, a 23(b)(3) case, warning against certifying classes in which "[q]uestions of individual

damage calculations will inevitably overwhelm questions common to the class.'" 133 S. Ct. at 1433. *Comcast* involved allegations of anti-competitive business practices that resulted in customers having to pay more for cable service. Over Comcast's objections, the trial court certified a class as to a single theory of anticompetitive conduct, and a divided Third Circuit panel affirmed.

This Court reversed. It observed that because the class members were entitled to recover damages stemming only from the specific theory of anticompetitive conduct on which the trial court granted class certification, "a model purporting to serve as evidence of damages must measure only those damages attributable to that theory." *Id.* If the model fails to do so, it cannot then be used to establish "that damages are susceptible of measurement across the entire class" as required by Rule 23(b)(3). *Id.* The Court pointed out that under the methodology endorsed by the Third Circuit, "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* Such an approach, however, impermissibly "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Comcast, like *Dukes*, accordingly brought a measure of much-needed discipline to Rule 23 class certification determinations, which for some time had been, "by all accounts, a terrible mess." Mark Moller, *Common Problems for the Common Answers Test: Class Certification in Amgen and Comcast*, 2013 Cato S. Ct. Rev. 301 (Cato Inst. 2013); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) ("Before *Behrend*, the case law was far more accommodating to class certification under Rule

23(b)(3). Though *Behrend* was grounded in what the Court deemed 'an unremarkable premise,' courts had not treated the principle as intuitive in the past").

B. In Affirming Certification Of A Rule 23 Class Overrun With Individual Questions Of Liability And Damages, The Eighth Circuit Disregarded This Court's Pronouncements In *Dukes* And *Comcast*

In declining to decertify the plaintiffs' Rule 23 class for lack of commonality, the trial court below "studied the *Dukes* decision and [found] its holdings and analysis largely inapplicable to and/or distinguishable from the instant case." It posited:

> The instant matter is not like *Dukes* where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process. Moreover, the court does not see the same evidentiary defects in the instant case as those addressed in *Dukes*, as the instant case is supportable by class-wide proof.

Pet. App. 37a.

Affirming, a fractured Eighth Circuit paid lip service to, but ultimately disregarded, both *Dukes* and the Court's subsequent decision in *Comcast*, electing instead to follow earlier decided, intra- and extra-circuit court rulings that construed Rule 23(a) commonality far more liberally than now is permitted. Pet. App. 9a (quoting *DeBoer v. Mellon Mort. Co.*, 64 F.3d 1171 (8th Cir. 1995); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003)).

Among other things, it found that class certification under Rule 23(b)(3) was proper, because "[w]hile individual plaintiffs varied in their donning and doffing routines, their complaint is not dominated by individual issues such that the varied circumstances ... prevent 'one stroke' determination." Pet. App. 8a (quotations omitted). Furthermore, "applying Tyson's K-Code policy and expert testimony to 'generate ... answers' for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)." *Id.* As Judge Beam in his dissent to denial of panel rehearing pointed out, however, *Mt. Clemens* established a burden-shifting rule for assessing damages for underpayment of wages where the employer failed to maintain any proper records, which is not the case here. Pet. App. 121a (Beam, J., dissenting).

Judge Beam also objected to the fact that while the class members all were subject to the same compensation system, their wage claims were not subject to the same *answer* across the class. In particular, he noted that plant employees "are required to wear a different combination of sanitary and protective gear" depending on their particular job. Pet. App. 21a (Beam, J. dissenting). For instance:

> Those employees wearing knives to use in conjunction with their particular duties on a particular day are required to wear a combination of a plastic belly guard, mesh apron, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining the knives and knife scabbards ("knife-related gear"). Other workers are required to wear a hard hat, hairnet, beard net, earplugs, ear muffs, rubber or cotton

> gloves, and rubber or plastic aprons ("sanitary gear").

Id. Even though the majority acknowledged that some employees would require more, and others less, time to don and doff the necessary equipment – which would directly impact whether and to what extent they were owed additional compensation above the K-Code time payment – it nevertheless found the plaintiffs' imprecise, "sample employee" damages model sufficient to justify class certification, contrary to this Court's holdings in *Dukes* and *Comcast*.

As Judge Beam observed:

> Here we have undifferentiated presentations of evidence, including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages, ultimately resulting in a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict. Assuming that the district court could now re-open the proceedings ..., the exercise would be laborious, virtually unguided, and well outside of the limiting parameters the Supreme Court has, as a matter of law, placed upon use of the Rule 23 class action machinery.

Pet. App. 24a (Beam, J. dissenting). Indeed, this Court in *Dukes* and *Comcast* firmly rejected such "Trial by Formula" approaches to establishing classwide damages, 131 S. Ct. at 2551, and for good reason as one commentator suggests:

> The use of statistics in class actions has been characterized as trial by formula, identifying gross statistical disparities, and bellwether trials;

> yet, each of these variants contains similar weaknesses. First, within the context of sampling, extrapolation allows a non-plaintiff to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation. It does not, however, allow the defendant a reciprocal opportunity to defend against each absent class member. ... Second, finding causation to a claimed injury becomes a function of statistical variability that results from various factors like quality, quantity, and class members' characteristics.

Ghoshray, 44 Loy. U. Chi. L.J. at 498-99 (footnotes omitted).

C. The Decision Below Magnifies The Disagreement In The Lower Courts Regarding The Scope Of *Dukes* And *Comcast* And Their Broad Applicability To Rule 23 Class Certification Determinations

Since *Dukes*, questions have emerged in the courts regarding whether and to what extent it should be applied to class certification determinations generally. For example, some courts downplay the fact that *Dukes* rejects the notion that plaintiffs may establish proof of classwide damages through statistical sampling, the very methodology utilized by the plaintiffs in the instant case and sanctioned by the court below. This Court observed:

> The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result

> would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims.

Dukes, 131 S. Ct. at 2561. Some lower courts have adhered to that principle, *see, e.g., Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013), while others have not. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (U.S. Jan. 28, 2015); *In re Johnson*, 760 F.3d 66 (D.C. Cir. 2014).

In *Johnson*, for instance, the D.C. Circuit acknowledged that under *Dukes*, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 760 F.3d at 75 (citation and internal quotation omitted). It nevertheless permitted the trial court's order granting class certification to stand, reasoning that the trial court:

> [I]n *effect* complied in advance with that aspect of the *Wal–Mart* decision. Unlike the lower courts in *Wal–Mart*, the district court here did not certify the class on the ground that it could resolve individualized issues on a classwide basis. The practical effect of the district court's decision

> is that it certified a "class action with respect to particular issues," which it is expressly authorized to do by Rule 23(c)(4).

Id. (emphasis added).[2]

Since *Dukes*, and "[i]n the wake of *Comcast* ... district and circuit courts alike have grappled with the scope, effect, and application of *Comcast's* holding, and in particular, its interaction with non-antitrust class actions." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (S.D.N.Y. 2013), *aff'd*, __ Fed. Appx. __, 2015 WL 525697 (2d Cir. Feb. 10, 2015). In general:

> [T]he class-certification decisions applying *Comcast* can be divided into three, distinct groups: (1) courts distinguishing *Comcast*, and finding a common formula at the class certification stage, and thus, predominance, satisfied; (2) courts applying *Comcast* and rejecting class certification on the ground that no common formula exists for the determination of damages; and (3) courts embracing a middle approach whereby they employ Rule 23(c)(4) and maintain class certification as to liability only, leaving damages for a separate, individualized determination.[3]

Id. at 581-82 (citations omitted).

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[2] The D.C. Circuit did so, despite conceding that "there is a controversy over the proper use of issue classes, especially when the result is to isolate a particular issue that would otherwise derogate from the predominance of common issues in a 23(b)(3) class action." *In re Johnson*, 760 F.3d at 75. *See infra* note 3.

[3] Federal appeals courts strongly disagree on the propriety of utilizing Rule 23(c)(4) to certify issue classes where other required elements of Rule 23 have not been satisfied. The Fifth Circuit holds that using Rule 23(c)(4) as a means of narrowing down a proposed class until the plaintiffs are able to establish

Some courts have read *Comcast* narrowly. *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402-03 (2d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18-19, 23 (1st Cir. 2015); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir.), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014); *see also Perez v. Allstate Ins. Co.*, 2014 WL 4635745, at *21 (E.D.N.Y. Sept. 16, 2014) ("neither *Comcast* nor any other binding authority holds that the need to calculate damages on an individualized basis necessarily defeats the predominance element of Rule 23(b)(3)"). In *Roach v. T.L. Cannon Corp.*, for instance, the Second Circuit reversed a trial court's order denying certification of a 23(b)(3) nationwide class, concluding that "*Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis." 778 F.3d at 402.

There, the plaintiffs sued the owner-operator of several Applebee's Neighborhood Grill and Bar Restaurants, alleging among other things that the company "had a policy of not paying hourly employees an extra hour of pay when working a ten-hour work day as was then required" under New York state law (the "10-hour spread" claim). *Id.* at 403. In denying their motion to certify a 23(b)(3) nationwide class, the

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common issues of fact or law is improper. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). In contrast, the Second Circuit takes the position that Rule 23(c)(4) may be utilized "to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006). The Seventh Circuit is in accord. *See McReynolds v. Merrill Lynch, Inc.*, 672 F.3d 482 (7th Cir. 2012).

trial court, relying on *Comcast*, found that because the plaintiffs have offered no "'model of damages susceptible of measurement' across the [entire] putative [10-hour spread claim] class, ... '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'" *Id.* at 404 (citations omitted).

The Second Circuit reversed, observing, "Prior to the Supreme Court's decision in *Comcast*, it was 'well-established' in this Circuit that 'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23(b)(3). ... We do not read *Comcast* as overruling these decisions." *Id.* at 405. Other courts similarly have read *Comcast* narrowly to permit certification of otherwise uncertifiable classes. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage—simply that at class certification, the damages calculation must reflect the liability theory") (citation omitted); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir.) (*Comcast* "has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability"), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014).

Other courts construe *Comcast* differently, finding that where there exists no readily ascertainable means by which to measure and determine damages as to the class as a whole, Rule 23(b)(3) class certification is improper. *See, e.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("The

predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member. In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision") (citations omitted); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) ("Although individualized monetary claims belong in Rule 23(b)(3), predominance may be destroyed if individualized issues will overwhelm those questions common to the class") (citations omitted); *see also Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 627 (S.D. Cal. 2014) ("*Comcast* makes clear that individualized damages determinations can defeat Rule 23(b)(3)'s predominance requirement"), *appeal docketed*, No. 15-55361 (9th Cir. Mar. 6, 2015).

D. In The Absence Of Clear Direction From This Court, Lower Courts Will Continue To Apply Very Different Standards In Deciding Whether To Certify Claims Involving Inherently Individualized Issues, Such As In The Wage And Hour Context

The sometimes widely divergent standards applied by federal courts in evaluating 23(b)(3) motions to certify wage and hour classes can result in vastly different treatment of similarly situated workers, depending largely on the jurisdiction in which their claim is brought. Thus, while "*Dukes* is widely understood as reinvigorating the notion that class actions are the exception, rather than the rule," [courts are divided] "as to whether claims alleging widespread underpayment of wages fits within the

exception." *Enriquez v. Cherry Hill Mkt. Corp.*, 993 F. Supp. 2d 229, 236-37 (E.D.N.Y. 2013). As the district court in *Enriquez* explained:

> In part, the divide is simply a reflection of the reality that not all wage-and-hour cases are the same. In some, the claim is that an employer has classified a category of employees as exempt .... In other cases—including this one—the claim is that an employer has systematically failed to pay employees the legally mandated wage for all hours worked. At least one district court has certified such a case as a class action, finding that the employer's "overtime policy 'is the "glue" that the Supreme Court found lacking in *Dukes*.'" In the Court's view, however, that holding runs afoul of *Dukes*'s clear pronouncement that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury ...." In other words, alleging that systematic underpayment of wages amounts to a "policy" of noncompliance with the wage-and-hour laws does not establish commonality if demonstrating such noncompliance requires, as it would in this case, an inquiry into the total pay and total hours worked for each employee.

Id. at 237 (citations omitted).

As in this case, individuals seeking to establish an employer's liability for alleged wage and hour violations must prove that they actually worked a specific number of hours and were not properly compensated for that time. *See, e.g., Davis v. Abingdon Mem'l Hosp.*, 765 F.3d 236, 242-43 (3d Cir. 2014). Accordingly, the basic requirements of a wage and hour claim, whether in state or federal court, often

involve highly individualized factual allegations that can vary significantly from plaintiff to plaintiff.

For those courts that faithfully adhere to this Court's reasoning in *Dukes* and *Comcast*, those individualized determinations would in most cases be found to predominate over common questions, such as whether employees felt pressure to underreport their hours worked. For others seeking to limit the scope of *Dukes* and *Comcast*, such highly individualized liability and damages issues "alone *cannot* preclude certification under Rule 23(b)(3)." *Roach*, 778 F.3d at 409 (emphasis added).

II. IMPROPER CERTIFICATION OF EMPLOYMENT CLAIMS ENCOURAGES OPPORTUNISTIC, "BET-THE-FARM" LITIGATION, WHICH ALL TOO OFTEN PLACES EMPLOYERS UNDER INORDINATE PRESSURE TO SETTLE, REGARDLESS OF MERIT

Continued inconsistency in the courts regarding the propriety of Rule 23(b)(3) class certification will have a profound effect on the business community in general, but especially on large companies that operate and employ staff across the United States. Such inconsistency threatens to expose those employers to significant risk of litigation under myriad worker protection laws, but especially in the wage and hour context. In particular, the decision below magnifies the conflict in the courts regarding whether, in light of *Dukes* and *Comcast*, 23(b)(3) class certification is permissible where – as routinely is the case in wage and hour class litigation – significant questions of disparate, individualized damages are presented.

This Court has said repeatedly that the class action procedure is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Dukes*, 131 S. Ct. at 2550 (quoting *Yamasaki*). The decision below does not adhere to that rule, and if allowed to stand, will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims. Given the proliferation of class-based wage and hour litigation at the state and federal levels, employers already are at great financial risk, both in terms of the substantial fees associated with merely defending such claims, as well as the frequently exorbitant cost to resolve them.

Indeed:

> With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) (footnote omitted). By limiting the reach of *Dukes* and *Comcast* and allowing highly individualized claims to form the basis for class certification – even where, for instance, the class contains entirely uninjured class members, *Nexium Antitrust Litig.*, 777 F.3d at 31 (certifying a class in which most of the class members were "probably injured") – some courts, including the court below, have all but ignored the reality that class

certification almost invariably leads to a settlement. As the Seventh Circuit observed, "Certification as a class action can 'coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit,' and in this case is 'highly likely to because of the magnitude of the potential damages.'" *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (citations omitted).

Allowing plaintiffs to aggregate hundreds or thousands of claims without having to satisfy all the required elements of Rule 23 invariably will lead to the class action device being used not in the limited manner in which it was intended, but rather as a strategic and opportunistic means of extracting settlements from employers wishing to avoid the financial and commercial risk associated with class-wide litigation.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

TYSON FOODS, INC.
Petitioner,

v.

PEG BOUAPHAKEO, et al., individually and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations representing manufacturers and those concerned with the fairness of the civil justice system. *Amici* are concerned that courts, such as the Eighth Circuit here, are allowing use of statistical models that gloss over material differences among class members and allow overbroad certification of classes that include uninjured members.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring

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[1] Per Rule 37.2, counsel of record for all parties received notice of Amici's intention to file this brief at least ten days prior to its due date. The parties have filed a blanket letter of consent with the Clerk of the Court. Per Rule 37.6, Amici states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the Amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The Metals Service Center Institute ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. MSCI's 400 member companies have over 1,500 locations throughout North America.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court warned against "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, instructing courts that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury," not "merely that they have all suffered a violation of the same provision of law." 131 S. Ct. 2541, 2551, 2561 (2011) (internal citation omitted). The Court further required in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), a close tie between damage models and the theory of liability.

Yet, the Eighth Circuit here and other federal courts continue to accept creative theories for both liability and damages that give short shrift to *Wal-Mart* and *Comcast*.[2] Through use of statistical mod-

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[2] *See* Kenneth L. Racowski, *No Consensus on Application of 'Comcast v. Behrend'*, Legal Intelligencer, Mar. 31, 2015, *at* http://www.thelegalintelligencer.com/litigation/id=1202721836338/No-Consensus-on-Application-of-Comcast-v-Behrend.

els, such as sampling, courts allow plaintiffs to mask their inability to fulfill core standing and class certification requirements. Such methods contribute to a rise of class actions with significant numbers of uninjured and dissimilar plaintiffs, not just in wage-and-hour litigation, but in antitrust, product liability, consumer and other types of claims.

Here, Plaintiffs used statistical modeling to create a fictional plaintiff as the basis for seeking class certification. The need for such a technique should have been a clear signal that the actual Plaintiffs could not meet the standards required for class certification. Plaintiffs allege that Tyson Foods did not pay overtime for workers who had to don and doff protective gear. Yet, the workers varied widely in the type and amount of protective gear required, whether they used optional gear, the positions they held, whether they were paid an additional fixed wage for donning and doffing gear, and whether donning and doffing time was compensated as part of their shifts. *See* Pet. at 4-7. Further, as Plaintiffs' own expert observed, the time spent donning gear ranged from thirty seconds to ten minutes for employees who worked on the processing floor and doffing gear from twelve seconds to approximately six minutes for those on the slaughter floor. *See* Pet. at 9. The claim of each plaintiff requires evidence and defenses specific to that employee's situation.

To shoe-horn these disparate claims into a purported class, Plaintiff sampled a small, self-selected group of employees to create an "average employee." This modeling overstates Plaintiff's allegations: the sample was too small to produce valid results, it suffered from selection bias as Plaintiff's expert conced-

ed the sample was not "random," and the results had a wide margin of error. Nevertheless, Plaintiffs were allowed to compute an aggregate award based on the fictional average employee, regardless of any actual damages each employee actually sustained.

The problem with such sampling techniques is they can allow Plaintiffs to hide the deficiencies of individual class member claims. Here, even under their own rose-colored methodology, Plaintiffs' expert acknowledged that at least two hundred class members were fully compensated for donning and doffing their gear and had no injury. Plaintiffs' sampling techniques also overlooked the key distinctions among class members discussed above. Statistical sampling and other aggregation tools must be used to resolve common issues of law and fact, not avoid inconvenient differences.

The class action mechanism can be valuable when efficiently producing results comparable to what could be achieved in individual claims. Yet, as discussed below, many lower courts are not properly following *Wal-Mart* and *Comcast* and are certifying class actions when there is insufficient real evidence to bind the members. This case presents a needed opportunity for the Court to emphasize that district courts must give "rigorous analysis" at the class certification stage. Courts must ensure that statistical modeling is not used to mask the inability of plaintiffs to meet their basic substantive and procedural burdens or overcome the due process rights of defendants. *Amici* respectfully request the Court to grant *certiorari* and reverse the decision below.

ARGUMENT

I. STATISTICAL SAMPLING SHOULD NOT BE ALLOWED TO OBSCURE THE INCLUSION OF UNINJURED CLASS MEMBERS

The Petition should be granted to assure that Plaintiffs cannot use statistical sampling to obscure a fundamental element of a civil claim: injury. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). Review is needed to reconcile the widely divergent views of the U.S. Courts of Appeals on whether and, if so, under which conditions a court may certify a class with uninjured members.

As discussed below, some Circuits follow what *amici* view as the proper approach of assuring that all class members have injury, and, therefore, standing, as a prerequisite to class certification. Others allow the certification of classes that include some, many, or even mostly uninjured individuals, so long as a class representative can establish injury. Even in the latter group, statistical modeling can artificially deflate the number of injured plaintiffs in an effort to vault over whatever bar that Circuit uses.

A. Principles of Standing Should Preclude Courts From Certifying Classes That Include Members Who Have No Injury

This case presents this Court with an important opportunity to address a Circuit split on the threshold question of whether Article III standing even permits certification of a class with uninjured mem-

bers. This Court has cautioned that "courts must be more careful to insist on the formal rules of standing, not less so" in the era of class actions, *Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), but the Circuits remain deeply divided on this issue.

The Second Circuit has correctly held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). A class must be "defined in such a way that anyone within it would have standing." *Id.* Other circuits have followed this approach, recognizing that injury-in-fact is the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff who cannot show injury fairly traceable to the challenged defendant's action cannot hide in the crowd of those who may. *See, e.g., Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves").

In contrast, the Seventh Circuit has taken a nearly polar opposite view, allowing courts to ignore the presence of uninjured class members at the class certification stage. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). In *Kohen*, the Seventh Circuit explained that it is "almost inevitable" that a "class will often include persons who have not been injured by the defendant's conduct because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Id.* at 677. The Tenth and Third Circuits have followed a similar path, holding that only the named plaintiff must have standing before certifica-

tion. *See id.* at 676; *see also DG ex rel. Stricklin*, 594 F.3d 1188, 1197-98 (10th Cir. 2010); *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998). These rulings, though, run afoul of this Court's instruction that procedural rules, including Rule 23, "shall not abridge, enlarge or modify any substantive right." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Rules Enabling Act, 28 U.S.C. § 2072(b)).

Other circuits send mixed messages. For example, the Ninth Circuit cited *Denney* with approval in vacating certification of a nationwide consumer protection claim as overbroad where it was "likely that many class members were never exposed to the allegedly misleading advertisements" of an automaker. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-96 (9th Cir. 2012). Months earlier that Circuit found that "standing is satisfied if at least one named plaintiff meets the requirements." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011) (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)).

Similarly, the Fifth Circuit relied on *Kohen* in ruling that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by defendant's conduct." *Mims v. Steward Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (citation omitted). Though, more recently, it declined to choose between the *Denney* or *Kohen* approaches. *See In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014) (finding absent class members alleged sufficient injury and causation under both tests to support certification of a settlement class).

As in the case at bar, the inclusion of uninjured plaintiffs can falsely inflate the size of a class and improperly increase liability. It also could create disproportionate pressure for companies to settle claims regardless of merit. The Court should grant the Petition to address these issues and hold, consistent with Article III, that a federal court must determine at the certification stage whether class members lack injury and, if so, reject certification.

B. The Presence of Uninjured Class Members Has Become Problematic in Many Types of Class Actions

The issues presented in this case have a direct impact on courts that do not disqualify classes with uninjured plaintiffs on standing grounds. These courts have struggled with whether and when the inclusion of uninjured plaintiffs can satisfy the Rule 23 requirements that common issues of law and fact predominate and that the claims of class representatives, who may have injury, are typical of class members who do not. As the cases below show, these issues arise in wage-and-hour cases, such as the one here, as well as a wide variety of other types of class actions, including product liability, antitrust, consumer, and statutory claims. Thus, even if the Court does not bar claims as a matter of standing, the Court should grant the Petition to give guidance on when, if ever, classes can meet certification requirements when they include uninjured plaintiffs.

Some courts, rather than deny class certification on standing grounds when they include uninjured members, have held that such claims do not satisfy Rule 23's commonality and typicality requirements. *See, e.g., In re: Rail Freight Fuel Surcharge Antitrust*

Litig., 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing class certification where plaintiffs' model for showing class-wide damages did not distinguish shippers who were overcharged from those who were not); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (finding the class failed to meet certification standards where the class included members that did not see and could not have relied on the allegedly misleading advertising material). The Eighth Circuit should have followed this path in the case at bar.

Other courts have adopted a vast array of approaches to uninjured members in a class, with splits existing among and within the circuits. Several circuits have sought to identify a tipping point where the proportion of uninjured class members precludes certification. The Seventh Circuit, for example, held in *Kohen* that "a class should not be certified if it is apparent that it contains a *great many* persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677-78 (emphasis added). Another Seventh Circuit panel ruled that "[t]here is no precise measure for 'a great many' and that "if a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof." *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 819, 824-25 (7th Cir. 2012). A third panel found that even if class members were uninjured, their lack of injury was irrelevant to certification. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-87 (7th Cir. 2014). Finally, a fourth panel held that if a class representative's claim "is idiosyncratic or possibly unique" because others do not share that injury, then (s)he is an un-

suitable class representative. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757-58 (7th Cir. 2014).

The First Circuit favors a "de minimis" standard, holding not every putative class member must establish injury, and that it will certify a class where the number of uninjured members is "de minimis." *In re Nexium Antitrust Litig.*, 777 F.3d at 21. Several district courts have held that a class with uninjured members can be certified if there is common evidence of "widespread injury to the class" or that a "substantial majority" or "nearly all" members" experienced injury. *See, e.g., Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 23 (D.D.C. 2012); *In re Polyurethane Foam Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *17 (N.D. Ohio Nov. 17, 2014) (unredacted opinion of Apr. 9, 2014), 23(f) *pet. denied sub nom. In re: Carpenter Co.* (6th Cir. Sept. 29, 2014), *cert. denied sub nom. Carpenter, Co. v. Ace Foam, Inc.*, No. 14-577, 2015 WL 852426 (U.S. Mar. 2, 2015).

Further, the Sixth and Seventh Circuits have held that class certification could be based on the mere fact that the named plaintiff and class shared a common question about the product, *i.e.*, whether it was defective, making the inclusion of injured claimants a moot point at the certification stage. *See Whirlpool*, 722 F.3d at 855 (citing *Daffin v. Ford Motor Co.*, 458 F.3d 549, 555-56 (6th Cir. 2006)); *Butler*, 727 F.3d at 801. The Court is familiar with the washing machine litigation, in which it vacated and remanded two certified cases in light of *Comcast* then denied further review after the courts reinstated class certification. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated sub*

nom. Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *on remand*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Both courts rejected this Court's instructions, allowing plaintiffs' creative pleading that many washing machine owners without a mold issue were injured merely by purchasing a product from a product-line where other products in that line were allegedly defective. *See* 722 F.3d at 856 (concluding these owners paid a premium price for a machine from a non-defective line of products).[3]

Even in some of these cases, courts have held that uninjured class members not excluded at the certification stage must be addressed through individual determinations of damages. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 20-21 (1st Cir. 2015). Under these rulings, the courts are to ensure that "defendants will not pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members." *In re Nexium*, 777 F.3d at 21-22.

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[3] *See also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (plaintiffs who experienced premature tire wear could represent tire owners who did not); *In re ConAgra Foods, Inc.*, -- F. Supp.3d --, No. CV 11-05379 MMM, 2015 WL 1062756, at *27, *64-65 (C.D. Cal. Feb. 23, 2015) (certifying class based on a fictional "reasonable" consumer); *In re Urethane Antitrust Litig.*, 768 F.2d 1245, 1254 (10th Cir. 2014), *petition for cert. filed* (Mar. 9, 2015) (observing in an antitrust case that some plaintiffs "avoid[ed] injury.").

Thus, the case at bar would have fared differently based on the circuit where it was heard. In some circuits, it would have been dismissed outright. In others, the use of statistical modeling to artificially deflate the number of uninjured plaintiffs could have improperly pushed the class over the circuit's threshold for certifying classes with uninjured members. Also, the district and appellate courts did not provide even the minimal safeguard of assuring that uninjured class members receive no recovery through individual determination of damages. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 804-05 (8th Cir. 2014) (Bean, J., dissenting) (finding it inappropriate that "each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict").

The Court should frown on such opportunities for litigation gamesmanship. It should clarify whether, and if so when, district courts can certify classes that include uninjured members, notwithstanding the issue of standing. It also should require courts to assure at the certification stage that models do not falsely mask the amount of class members who have not experienced any injury. The federal judiciary must make sure that Rule 23 does not open a path where uninjured plaintiffs receive a windfall, those with significant losses are undercompensated, and defendants' due process rights are violated.

II. THE COURT SHOULD SET GUIDELINES FOR WHEN, IF EVER, STATISTICAL MODELS CAN OVERCOME DISTINCTIONS AMONG CLASS MEMBERS

Aside from issues of uninjured plaintiffs, the use of statistical modeling, generally, can be a clear sig-

nal that the proposed class is simply too diverse, with too many variables to meet the commonality requirement of Rule 23. When plaintiffs, as they did here, resort to creating a "fictional typical" class member it should be "a caution signal to the district court that classwide proof of damages [is] impermissible." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). Certifying classes based on such models "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

Such cases regularly come before federal courts, making this Petition an important vehicle for assuring that courts do not turn a blind eye to the impropriety of models that distort key elements of class certification and the rights of the defendants. In the two years since the *Comcast* decision, there are still clear inconsistencies among the courts. For example, the Tenth Circuit recently allowed an aggregate damages approach that relied on the creation of an average plaintiff, as here. *See In re Urethane Antitrust Litig.*, 768 F.3d at 1251-54 (involving the same expert whose damages theory this Court rejected in *Comcast*). The Court of Appeals baldly, and wrongly, concluded that a defendant "has no interest in the method of distributing the aggregate damages award among the class members." *Id.* at 1269.

The Ninth Circuit also affirmed certification in a class action last year where "statistical sampling and representative testimony" were similarly deemed "acceptable ways to determine liability." *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014), *pet. for cert. filed* (Jan. 24, 2015) (No. 14-

910). The Ninth Circuit did not go as far as the Tenth Circuit, though, finding that the defendant's right to a fair and accurate resolution of the claims could be adequately safeguarded by allowing the defendant to present individualized defenses in a separate damages phase. *See id.* at 1168.

Such legal gymnastics should signal, as the First Circuit has previously held, that the use of a formula may be an effort to "absolve[] plaintiffs from the duty to prove each class member was harmed by the defendants' practice." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (citation and alteration omitted). Yet, that is what is happening in the district courts. In a lower court case involving antitrust allegations last year, plaintiffs were allowed to assume that all purchasers uniformly paid the exact same overcharge despite the fact that each purchaser individually negotiated his or her own prices. *See In re Polyurethane Foam Litig.*, 2014 WL 6461355, at *3. This damages model, like the one at bar which did not account for class members paid for donning and doffing time, failed to account for evidence showing that some purchasers absorbed, rather than passed on to customers, price increases due to the overcharges. *Id.*

As this Court made clear in *Wal-Mart*, courts should not replace actual evidence with novel sampling and mathematical projects that obscure the accurate resolution of individual claims. *See Wal-Mart*, 131 S.Ct. at 2561. Last year, the California Supreme Court followed *Wal-Mart* properly. *See Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916 (Cal. 2014). As here, the modeling was based on a small sample without evidence that those chosen would produce a

result that could be "fairly extrapolated to the entire class." *Id.* at 922-23, 940-41. While the court did not categorically bar statistical sampling, it cautioned that any "statistical plan for managing individual issues must be conducted with sufficient rigor" and recognized that "[s]tatistical methods cannot entirely substitute for common proof." *Id.* at 933.

This Court should grant *certiorari* to ensure that federal courts also follow the Court's rulings. Courts must not allow statistical sampling to gloss over significant differences between class members that would otherwise preclude class certification. Also, where statistical sampling is used, courts should make sure that (a) there is a legitimately representative sample, (b) individual defenses to liability are preserved, and (c) each class member would receive compensation reflecting actual losses. The Eighth Circuit's decision to affirm the class in the case at bar adhered to none of these principles.

III. ALLOWING PLAINTIFFS TO OBSCURE DEFICIENCIES IN THEIR CASES WILL ENCOURAGE SPECULATIVE LITIGATION

The importance of granting *certiorari* and requiring courts to rigorously analyze statistical models before certifying a class is underscored by this Court's observation that certification "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The pressure to settle class actions once certified is significant. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (with "even a small chance

of a devastating loss, defendants will feel significant "pressure[ ]" to settle "questionable claims"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 599 (2007) (the threat of expensive litigation "will push cost-conscious defendants to settle even anemic cases").

In the washing machine litigation discussed above, Whirlpool was one of the few defendants willing to take a class action to trial and won a favorable verdict. *See* Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*, Bloomberg Business, Nov. 5, 2014, *at* http://www.bloomberg.com/bw/articles/2014-11-05/whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come. Such exoneration is illusive for many companies, particularly in massive consumer protection, antitrust, or employment disputes. Businesses have a long history of settling tenuous claims when purported classes are certified, regardless of the merits. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.* 818 F.2d 145, 151 (2d Cir. 1987) (affirming $180 million class settlement even though it was clear the trial court "viewed the plaintiffs' case as . virtually baseless"); *cf.* Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (labeling such resolutions as "blackmail settlements").[4]

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[4] As courts have explained, "the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route." *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir. 1974) (Mansfield, J., concurring). "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

If the Court denies the Petition, businesses will undoubtedly face an increasing number of highly speculative, creative class actions. The Eighth Circuit's decision to allow certification of an overbroad class, the inclusion of numerous uninjured members, and allowing class members to collect pro rata shares of aggregate damages regardless of actual losses is sure to invite meritless and speculative class actions.

For example, in the past few years, a new area of litigation rife with such attempts has sprung in the area of privacy and data security. In these class actions, few if any of the claimants have sustained any economic loss. Many courts, following *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), have properly dismissed classes with uninjured claimants for lack of standing.[5] Inventive class action plaintiffs' attorneys have responded by developing novel damages theories, which include statistical sampling, to create an "average" loss. *See, e.g., In re Hannaford Bros. Co. Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification because plaintiffs had not developed the expert testimony, but not postulating as to whether the modeling would have been valid if presented).

Courts could use guidance on how to approach the novel modeling theories put forth in the case at bar. There may be legitimate uses for statistical models in litigation, but not as a substitute for having to sat-

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[5] *See, e.g., In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, MDL No. 2360, 2014 WL 1858458 (D.D.C. May 9, 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-8617, 2013 WL 4759588 (N.D. Ill. Sept 3, 2013); *Sam's East, Inc.*, No. 12-2618, 2013 WL 3756573 (D. Kan. July 16, 2013).

isfy the plaintiffs' key substantive and procedural elements of a class action.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CHICKEN COUNCIL (NCC) IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

NCC is a national organization whose members are involved in the U.S. poultry industry. NCC is committed to advocacy on behalf of its members in business, legislative, and judicial fora. Because of this commitment, NCC seeks to address issues germane to the poultry industry when such issues are presented to the U.S. Supreme Court.

Class and collective action litigation under State and Federal law for allegedly uncompensated fractional hours worked has, in recent decades, increased to levels unknown since the early days of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), and is a matter of great concern for the poultry industry. Certification of classes consisting of putative members with widely varying claims to damages, or no claim at all; statistically unsound methodology enlisted for the proof of claims; and, in some cases, the denial of the opportunity to present defenses to liability or damages, denies employers their Constitutional right to due process and subjects them to protracted litigation. NCC therefore seeks leave to file this brief on behalf of Petitioner as *amicus curiae*.

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[1] Pursuant to Supreme Court Rule 37.6, NCC represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than NCC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for all parties received timely notice of *amicus curiae's* intent to file this brief and all parties have filed blanket consents with the Clerk of Court.

SUMMARY OF ARGUMENT

Using a few dozen samples to determine liability and back pay damages for a class of thousands of employees tramples individual class members' rights, as well as the employer's right to assert defenses that may vary as to the circumstances of individual employees. Class actions are supposed to be fair and efficient, but this is neither. In the case below, sampling and averages were submitted as the basis for a "reasonable inference" for the amount of uncompensated time, but the jury was skeptical and awarded the plaintiffs less than 44% of what they asked. Substantial numbers of employees included in the class had no injury, even when the proposed average number of additional minutes was added to their hours worked. Using statistically dubious sampling techniques in a class action to secure money damages for putative class members, many of whom suffered no wrong, is neither efficient nor fair, and contravenes this Court's recent decisions, which have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551-2552, 180 L.Ed.2d 374 (2011); *Comcast Corp. v. Behrend*, 569 U.S. ——, ——, 133 S.Ct. 1426, 1431-1432, 185 L.Ed.2d 515 (2013).

The sampling-and-averages methodology upheld by the court below results in some plaintiffs being shortchanged, while others reap a windfall. If an individual plaintiff went to trial on a claim for wages due under the FLSA, or a State wage act, the hours worked by any other employee would be irrelevant, because only the hours worked by that individual

before the Court would be pertinent to show liability and/or damages. But under the averaging procedures permitted by the court below, some individual class members benefitted while others were harmed, depending on how the hours they actually worked compared to the average hours worked by the workers sampled. This is contrary to *Dukes*, and the provision of the Rules Enabling Act (REA), 28 U.S.C. § 2072(b), which provides that procedural "rules shall not abridge, enlarge or modify any substantive right." Affording the recovery of money damages to an uninjured class member is plainly the enlargement of a substantive right under the FLSA, which rationally limits suits for back wages to those who performed work for which they were not properly compensated. Similarly, the averaging methodology condoned by the court below shortchanges employees who worked more than the average number of hours, restricting their rights, and abridges the right of employers to assert defenses to individual claims. Certiorari should be granted to clarify that the rules mean what they say and that class and collective actions do not allow a class to bypass the burden of proof its members would have to carry as individual litigants.

In a normal FLSA case for back wages, the employer may plead and prove affirmative defenses to liability and damages. This was denied the employer in the case below, where the Court allowed a lump-sum award based on sampling and averages, and denied the employer the opportunity to show that many class members worked no uncompensated overtime, either because all their donning and doffing occurred on the clock; because the supplemental "K-code" time paid equaled or exceeded the amount of time they spent donning and doffing; or because, even if the "average" time were added to their hours worked, they still

did not work overtime and were entitled to no back pay. Conversely, employees who actually worked more than the average would receive less than full relief. The opinion below even suggested that the employer lacked standing to raise these issues, or to complain about the allocation of damages. Indeed, implicit in the ruling below is that the class members also lack standing to complain about such misallocation, because averages were sufficient to support a reasonable inference, regardless of the merits (or lack thereof) of individual claims.

This erosion of defenses is of great concern to NCC members, and should alarm all employers, since it ties their hands, and could expose them to legalized extortion by the unprincipled assertion of class and collective claims. The Court should grant certiorari and examine the case below to determine whether class and collective actions are being misused to secure the award of damages to individuals who are entitled to no relief.

It also violates due process for money damages to be extracted from a defendant and distributed to putative plaintiffs who have suffered no injury and are not legally entitled to any recovery. The distribution of a lump-sum award to a class where some (not all) members are due back pay also offends the architecture of the FLSA, which was carefully designed to authorize back pay awards only to employees who actually performed work for which they were not paid the minimum wage or overtime compensation, requires employees to plead and prove the amount and extent of unpaid wages, and expressly limits other relief to liquidated damages equal to back pay, eschewing any other measure of compensatory damages. Awarding damages in arbitrary

amounts divorced from hours worked is an impermissible modification of the relief available under the FLSA and also violates the REA.

The Court should grant certiorari because in the case below, both employees and the employer were disserved by the class action vehicle. The "law of averages" does not apply in a case for back wages. As Judge Posner noted in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), if the average number of uncompensated overtime hours per class member per week were five, using that formula to award overtime to a class member who had only one hour of overtime brings about a windfall on him: conversely, awarding five hours of back pay to a class member who worked 10 hours of overtime would under compensate him by half. That is exactly what has happened here.

Under the scheme condoned by the court below, who has the right to complain about such potential or inherent unfairness? Not the employer: the court below ruled that it lacked standing to challenge the distribution of damages, even to parties to whom it had no liability. Not the employees who worked more than the "average" number of uncompensated hours as determined by the Court. The class members who receive a windfall would not complain, but should the Court condone awards to those who were not injured? Certiorari should be granted to hold that class representatives must satisfy all of the criteria of commonality under 29 U.S.C. § 216(b) and/or Rule 23, that back pay awards may not be based on averages that cheat some class members and unjustly enrich others, and that individuals who have suffered no injury may not be included in a class of plaintiffs seeking back pay.

ARGUMENT

A. Certifying Classes Based On Extrapolation From Samples Adversely Affects Both Parties' Substantive Rights And Is Inconsistent With Due Process, The Rules Enabling Act, And Prior Decisions Of This Court.

NCC's members are troubled by the use of non-representative samples to determine liability and damages for classes that can include thousands of employees. This tramples individual class members' rights to pay for all compensable hours worked, bestows windfalls on some while shortchanging others, and denies the employer the right to assert defenses that may vary as to the circumstances of individual employees. In the case below, the court erred in finding that the "sampling" supported a reasonable inference as to uncompensated fractional hours worked by the class members. The evidence showed that class members wore different combinations of personal protective equipment and, as a result, there was wide variation in the amount of time individual class members spent on donning and doffing-related activities. In addition, substantial numbers of employees included in the class admittedly suffered no injury: even when the proposed average number of additional minutes was added to their hours worked, they worked no overtime hours for which they were due to be compensated. The only "reasonable inference" that can be drawn from these proceedings is that no class member is likely to receive a just award fairly compensating them for hours actually worked.

The use of a class action[2] to secure money damages for putative class members who suffered no wrong is neither efficient nor fair, and contravenes this Court's recent decisions, which have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551-2552, 180 L.Ed.2d 374 (2011); *Comcast Corp. v. Behrend*, 569 U.S. ——, ——, 133 S.Ct. 1426, 1431-1432, 185 L.Ed.2d 515 (2013). Such awards dilute the relief owed to class members with meritorious claims. Where a class is represented by injured parties with a plausible claim to damages, but purports to include class members who have suffered no injury and are entitled to no damages, "typicality" cannot be satisfied and the matter should not proceed as a class action. The petition should be granted so lower courts will refrain from certifying classes that include members who have no just claim to relief.

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[2] The case below involved Federal claims under the FLSA and its opt-in collective action provisions, 29 U.S.C. § 216(b), as well as State law claims under Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq.*. However, as Judge Posner observes, "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences." *Espenscheid*, 705 F.3d at 770 (citations omitted). This brief will address the impact of Rule 23's criteria on both types of actions.

1. Class Members Who Have No Injury Lack "Commonality" With Injured Class Members.

"In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir.2013) (quoting *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir.1994)). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) also requires that the named plaintiffs be appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

Commonality is not satisfied merely by drafting a complaint that states a common fact: for example, in this case, the plaintiff workers were paid gang time. *See* Richard Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132 (2009), cited in *Dukes*, 131 S. Ct. at 2551. Rather, commonality requires the named plaintiff to demonstrate that the class members "have suffered the same injury," *Dukes* 131 S. Ct. at 2551, quoting

Falcon, 457 U.S. at 157, 102 S.Ct. 2364 (emphasis added). Yet in the case below, the District Court certified, and the Court of Appeals approved, a class that included individuals who suffered no injury. This was error. Rule 23 is not supposed to operate as a vacuum cleaner, indiscriminately sucking in members who have not been injured along with those who have.

2. The Court Below Erred In Failing To Decertify Or Redefine The Class So It Included Only Members With Common Injury.

The court below erred in finding that the plaintiffs did not have to show they all had suffered "*the same* injury," *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, at 798 n.5 (8th Cir. 2014) (emphasis added), and in allowing the jury to award a lump sum based on hypothetical "average" claims where there were widely varying actual claims asserted. The error lies in concluding that all class members do not have to suffer any injury. This is contrary to the very pillar of commonality. *See Dukes*, 131 S. Ct. 2551 ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.") (emphasis added.) There is no commonality where some class members had no injury and hence no standing to pursue a claim.

In *Dukes*, the Supreme Court expressed disapproval of "trial by formula," and held that "[c]ontrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay." 131 S. Ct. at 2560. The decision below does not live up to the standards

this Court set in *Dukes* because it allowed inference based on data collected from individuals who performed uncompensated activities to be generalized into awards for individuals who performed no uncompensated work. Certiorari should be granted and conformity to this Court's binding precedents required.

B. Including Uninjured Members In The Class Violates The Rules Enabling Act's Prohibition Against Abridgement, Enlargement, Or Modification Of Remedies.

Neither the FLSA collective action nor the Iowa Wage Payment Collection Law (IWPCL) Rule 23(b)(3) class action should have been certified, either as a matter of fact or a matter of law. *Dukes*, 131 S.Ct. at 2551. In *Dukes*, this Court rejected a procedure whereby "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.* at 2561. This is almost precisely the methodology upheld by the court below resulting in some plaintiffs being shortchanged, while others reaped a windfall. If an individual plaintiff went to trial on a claim for wages due under the FLSA or a State wage act, the hours worked by any other employee would be irrelevant, because only the hours worked by that individual before the court would be pertinent to show liability and/or damages.

An employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 [66 S.Ct.

1187, 90 L.Ed. 1515] (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub.L. No. 80-49, 61 Stat. 84. And, as Judge Beam points out in his dissent to the denial of rehearing *en banc*, "if an employee suffers no damages by way of unpaid wages, he or she is not a proper member of an alleged federal or state class and the employer has no liability for such a class claim asserted by an employee or his or her named plaintiff representatives." *Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed.Appx. 578, 579 (8th Cir. 2014), citing *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir.2005) ("[D]amages to all class members must be shown to justify the class action."). But under the class averaging procedures conducted by the court below, many class members were relieved from this duty. Some individual class members benefitted while others were harmed, depending on how the hours they actually worked compare to hours worked by the "samples" selected by the plaintiffs' experts. This is contrary to *Comcast*, and the provision of the REA, 28 U.S.C. § 2072(b), which provides that procedural "rules shall not abridge, enlarge or modify any substantive right."

Affording the recovery of money damages to an uninjured party is plainly the enlargement of a substantive right under the FLSA, which rationally limits suits for back wages to those who performed work for which they were not properly compensated. By the same token, the averaging methodology condoned by the court below definitely shortchanges employees who worked more than the average number of hours, restricting their rights, and abridges the right of employers to assert defenses to individual claims. Certiorari should be granted to clarify that the rules mean what they say, and that class and collective actions are not a shortcut that allows a

class to avoid the burdens of proof they would have to carry as individuals.

C. The Rules Enabling Act Is Violated When The Defendant Employer Is Denied The Right To Assert Defenses, And Standing To Object To The Award of Damages To Uninjured Class Members.

In a normal FLSA case for back wages, the employer may plead and prove affirmative defenses. This was denied the employer in the case below, where the court allowed a lump-sum award based on sampling and denied the employer the opportunity to show that many class members worked no uncompensated overtime, either because all their donning and doffing occurred on the clock; because the supplemental "K-code" time equaled or exceeded the amount of time they spent donning and doffing; or because, even if the "average" time were added to their hours worked, they still did not work overtime and were entitled to no back pay. The opinions below even suggested that the employer lacked standing to raise these issues, or to complain about the allocation of damages. Indeed, implicit in the rulings below is that the class members also lack standing to complain about such misallocation, because averages were sufficient to support a reasonable inference, regardless of the merits or lack thereof of individual claims.

Procedural rules cannot be used to abridge, enlarge, or modify any substantive right. 28 U.S.C. § 2072; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("[R]ules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting § 2072)). In *Dukes*, the Court held that "[b]ecause the Rules Enabling Act

forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); *see Ortiz v. Fibreboard Corp.*, 527 U.S., 815, 845, 119 S.Ct. 2295 (1999), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S.Ct. at 2561. Yet that is precisely what the court below did here.

1. Depriving A Defendant Of Individualized Defenses Violates Due Process.

It is axiomatic that the Due Process Clause, U.S. Const. amend. V is violated when a defendant is deprived of an opportunity to plead or prove defenses and liability is imposed without proof of fault. *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972) ("Due process requires that there be an opportunity to present every available defense,'" citing *American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231 (1932). *See also Nickey v. Mississippi*, 292 U.S. 393, 396, 54 S.Ct. 743, 744, 78 L.Ed. 1323 (1934). It is a denial of due process if the defendant is precluded from presenting such defenses at all, which is what the court below ruled.

This erosion of defenses is of great concern to NCC members, and should alarm all employers, since it ties their hands and could expose them to legalized extortion by the unprincipled assertion of class and collective claims. The Court should grant certiorari and examine the case below to determine whether class and collective actions are being misused to secure the award of damages to parties who would be entitled to no relief, except through a class action.

2. Defendants Have Standing To Challenge The Award Of Money Damages To Class Members.

It violates due process for money damages to be extracted from a defendant and distributed to putative plaintiffs who have suffered no injury and are not legally entitled to any recovery. The distribution of a lump-sum award to a class where some (not all) members are due back pay also offends the architecture of the FLSA, which was carefully designed to authorize back pay awards only as to employees who actually performed work for which they were not paid the minimum wage or overtime compensation, requires employees to plead and prove the amount and extent of unpaid wages, and expressly limits other relief to liquidated damages equal to back pay, eschewing any other measure of compensatory damages. Awarding damages in arbitrary amounts divorced from hours worked is an impermissible modification of the relief available under the FLSA and thus violates the REA.

This Court also has recognized that a defendant in a class action has a legitimate stake in the distribution of an award to ensure that all members are bound and that exposure is at an end. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804-05, 105 S.Ct. 2965 (1985) (defendant had "standing" to assert arguments concerning the "rights" and "interests" of class members in order to ensure "entire plaintiff class is bound"). In *Phillips* the Court found that the defendant had standing to protect its own interests, which could be adversely affected if some plaintiffs were not bound by a court's ruling because they received incomplete relief. *See also Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) (defendant has

"an interest in ensuring it pays only legitimate claims" because if payment of "inaccurate claims" causes some class members to "get less than full relief," those class members may claim they are not bound by the judgment). Given the mystery surrounding the distribution of the lump sum award as cut by the jury in the case below, it seems certain that some members of the plaintiff class will get less-than-full relief, while some will get a windfall at other class members' expense. The potential exposure to future liability is an adequate interest to vest Tyson with standing to dispute the allocation of the award.

D. Class/Collective Actions Should Be Efficient And Fair, But This One Is Neither.

The Court should grant certiorari because in the case below, both employees and the employer were disserved by the class action vehicle. The "law of averages" does not apply in a case for back wages. As Judge Posner noted in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), if the average number of uncompensated overtime hours per class member per week were five, using that formula to award overtime to a class member who had only one hour of overtime brings about a windfall on him: conversely, awarding five hours of back pay to a class member who worked 10 hours of overtime would under compensate him by half. That is exactly what has happened here. Yet under the scheme condoned by the court below, who has the right to complain about such potential or inherent unfairness? Not the employer: the court below ruled that it lacked standing to challenge the distribution of damages, even to parties to whom it had no liability. Not the employees: who worked more than the "average" number of uncompensated hours as determined by

the court. The class members who receive a windfall would not complain, but should the court condone a windfall to those who were not injured? The practical effect of this situation is to condone an essentially arbitrary distribution of the proceeds.

Espenscheid involved independent-contractor-type satellite technicians and installers who were paid under a piece-rate system. 705 F.3d at 772–73. The Seventh Circuit Court of Appeals affirmed the decertification in that case, finding that class certification would require thousands of evidentiary hearings. *Id.* at 773. Notably, the court observed that *Espenscheid* was not the type of case where "it appear[s] that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program, so that there is no need for notice . . , the district court can award that that relief without terminating the class action and leaving the class members to their own devices.'" *Id.* (quoting *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir.2012)).

The *Espenscheid* Court recognized that it was impossible to determine the amount of damages due absent class members from the class representatives' claims. "To extrapolate from the experience of the 42 [representatives] to that of the 2341 [class members] would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage." 705 F.3d at 774. But no such uniformity existed. As a result, inferring "the work time of thousands of workers" from the experiences of a few would produce systemic discrepancies in damages to absent class members. *Id.* at 774. Those who worked fewer unpaid or underpaid hours than the "average representative"

would receive a windfall, while those who worked more a shortfall. *Id.* at 775.

Espenscheid affirmed the decertification of a class asserting federal and state wage-and-hour claims. *Id.* at 777. Decertification was appropriate because the plaintiffs' trial plan did not present a feasible way of determining the plaintiffs' damages; instead, calculating damages would have "require[d] 2341 separate evidentiary hearings." *Id.* at 773. These individualized inquiries were required because the employees varied in how much they worked and how they recorded their time. *Id.* As the Seventh Circuit noted, "[I]t's not as if each [employee] worked from 8 a.m. to 5 p.m. and was forbidden to take a lunch break and so worked a 45–hour week (unless he missed one or more days because of illness or some other reason) but was paid no overtime." *Id.* If that had been the case, the Court reasoned, "each [employee's] damages could be computed effortlessly, mechanically, from the number of days he worked each week and his hourly wage." *Id.* But a formulaic calculation of damages was not possible in *Espencheid*, over 2,000 "separate hearings loomed," and class treatment was therefore not appropriate. *Id.* at 775.

But individualized damages questions did *not* automatically thwart class certification in *Espenscheid*. Instead, the Seventh Circuit identified other expeditious ways of calculating damages, even in scenarios where damages may be individualized. The problem for the *Espenscheid* plaintiffs, though, was that they rejected the proposals that the District Court offered and they failed to offer any feasible alternatives for calculating damages. *See id.* at 773-76 (rejecting plaintiffs' proposal of presenting testimony from forty-two "representative" members of the class because

class counsel could not explain how these "representatives" were chosen). That left the plaintiffs back in the position of having to reconstruct their unreported work time from memory, inferred from the particulars of the jobs the [employees] did, or estimated in other ways" unique to each employee. *Id.* at 775.

A class or collective action is not the sole avenue for relief for workers who believe they have worked hours for which they have not been fairly compensated. As Judge Posner and others have observed, employees can seek back pay through the Secretary of Labor. Under 29 U.S.C. § 216(c), the Secretary is authorized to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees." The Secretary need not seek certification of a class under Rule 23 or collect opt-ins as private litigants under 29 U.S.C. § 216(b). And—perhaps this is the most telling difference—the Secretary is not awarded attorneys' fees paid by the employer. A worker represented by the Secretary ordinarily will recover the full measure of back wages due to him or her, plus an equal amount in liquidated damages: not an "average" award based on the sampled experience of co-workers who may have greater or lesser claims. This option affords tailored relief shorn of many of the complications that plagued the case below. The Court should grant certiorari and consider whether this might not be a preferable means of making workers whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE U.S. POULTRY & EGG ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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The U.S. Poultry & Egg Association respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Tyson Foods, Inc. ("Tyson").

INTEREST OF THE *AMICUS CURIAE* [1]

The U.S. Poultry & Egg Association ("USPOULTRY") is a non-profit trade association representing the interests of more than 30,000 producers who own and operate farms and other facilities that produce, process, and/or distribute poultry and eggs for domestic and world markets. USPOULTRY has numerous members who own and operate processing plants similar to the pork-processing plant that is the subject of this case. Dozens of USPOULTRY's members have recently been targets of class claims that are very similar to those in the present case and have included claims that the member violated the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, as amended, and state wage and hour laws by allegedly failing to pay employees for time spent donning and doffing sanitary and protective clothing and walking to and from their work stations. USPOULTRY's members face substantial and uncertain litigation burdens arising from the lack of clarity and appropriate limiting principles in class and collective action litigation. Thus, USPOULTRY has a direct and ongoing interest in the issues presented in this case regarding the standards used to certify

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[1] Pursuant to Supreme Court Rule 37.6, USPOULTRY represents that this brief was not authored in whole or in part by any party or their counsel and that USPOULTRY timely provided notice of its intent to file this brief to all parties. No person other than USPOULTRY, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Court.

class actions under Rule 23 of the Federal Rules of Civil Procedure and collective actions under the FLSA. Indeed, ensuring that federal courts properly apply relevant class and collective action certification[2] procedures is one of the most pressing and important concerns facing USPOULTRY's members.

USPOULTRY seeks to assist the Court by highlighting the importance of the issues presented beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention the large number of similar cases with similar issues in recent years, including cases where class or collective actions were improperly certified. Such decisions are rarely reviewed by appellate courts, and many of USPOULTRY's members feel economic pressure to settle, regardless of the underlying merits of the case, after losing the certification battle. Because of the experience of its members with respect to the matters at issue, USPOULTRY is well situated to brief the Court on the significance of the issues raised by Tyson and the need for guidance from this Court.

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[2] This Court recently noted that lower courts have borrowed class-action terminology by describing the process of joining co-plaintiffs under § 216(b) as "conditional certification" of a collective action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 n.1 (2013). Because courts continue to use the terms "certification" and "conditional certification" of a collective action, USPOULTRY does so in this brief.

ARGUMENT

I. THE LACK OF PROPER LIMITING PRINCIPLES ON THE CERTIFICATION OF COLLECTIVE ACTIONS UNDER THE FLSA HAS CAUSED A FLOOD OF LITIGATION THAT IS LIKELY TO CONTINUE.

In recent years, there has been a staggering increase in the number of FLSA cases and the number of FLSA collective actions filed in federal courts. *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U.L. Rev. 960, 1024 n.135 (Oct. 2012) ("Widespread resort to the FLSA collective action by litigants, however, is a relatively recent development, with the number of such actions increasing markedly since the 1990s."); *Fujiwara v. Sushi Yasuda Ltd.*, No. 12cv8742, 2014 U.S. Dist. LEXIS 159140, at *1 (S.D.N.Y. Nov. 12, 2014) (explaining that "[r]ecent years have witnessed an explosion in FLSA litigation" and that "FLSA cases constitute nearly 9% of the civil cases filed" in the Southern District of New York in 2014). Many of these cases, like the present case, involve parallel state law claims. (*See* pp. 5-8, *infra*.) In 1991, FLSA lawsuits constituted 0.6 percent of all civil lawsuits. *See* United States Government Accountability Office, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing its Guidance* 6 (2013).[3] By 2012, "FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent." *Id.* Between 2001 and 2013 alone, the number of FLSA cases filed in federal court increased from 1,854 to 7,764, an increase of over 400 percent. *See* Administrative Office of the United

[3] Available at http://www.gao.gov/assets/660/659772.pdf

States Courts, *Judicial Business of the United States Courts: 2001 Report of the Director*, Table C-2 at 46;[4] Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2014 Report of the Director*, Table C-2.[5] In 2014, the total number of FLSA lawsuits filed increased again, topping 8,000. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 5 (2015 ed.).[6]

At the heart of this explosion of FLSA cases in recent years has been the rise in collective actions. Between 1997 and 2010, the number of FLSA collective actions filed in federal courts increased from just 31 to at least 1,967. *See* Daunta Bembenista Panich & Christopher C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, Fed. Lawyer, Mar/Apr. 2011, at 14. In 2010, according to one study, 90 percent of state and federal class or collective actions filed in the United States were wage and hour claims. Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take* 1 (2012).[7] In 2014, virtually all FLSA lawsuits were filed as collective actions.

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[4] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2001.aspx

[5] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx.

[6] Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjAC&url=http%3A%2F%2Fwww.workplaceclassaction.com%2Ffiles%2F2015%2F01%2FWCAR-Intro2.pdf&ei=x6UuVezLLLHfsAT_1IDwDQ&usg=AFQjCNGzCbUP4j0USGMvTYJfHz6WyEZRPA

[7] Available at http://www.lb7.uscourts.gov/documents/12-19431.pdf.

See Annual Workplace Class Action Litigation Report, Seyfarth Shaw LLP, at 5 (2015 ed.).

One noted cause of this flood in FLSA collective action litigation is the relative ease to certification of a class because of a lack of limiting principles in this area: "Employees can obtain certification of FLSA 'class' actions with relative ease compared to employment discrimination class actions, and this ease of access has naturally drawn the attention of the plaintiffs' bar." *See* Panich & Murray, *supra*, at 14. In 2014, for example, plaintiffs in FLSA collective actions won roughly 70 percent of conditional certification motions and succeeded in about 52 percent of subsequent decertification bids by employers. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 7 (2015 ed.).

USPOULTRY conducted its own search of recent wage and hour cases, focusing specifically on claims alleging failure to pay for time spent donning and doffing in the aftermath of this Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), which held that the time employees at a meat processing plant spent walking to and from their work stations is compensable in addition to the time spent donning and doffing protective clothing. Searching only decisions reported on www.lexis.com after the Court's decision in *Alvarez*, there have been over seventy (70) collective actions or class actions certified (conditionally or otherwise) in federal district courts based on claims for failure to adequately compensate class members for time spent donning and doffing items.[8]

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[8] *See, e.g., Melgar v. O.K. Foods, Inc.*, No. 2:13-CV2169-RTD, 2015 U.S. Dist. LEXIS 41807, at *8 (W.D. Ark. Mar. 31, 2015); *Knaak v. Armour-Eckrich Meats LLC*, 991 F. Supp. 2d 1052, 1060-61 (D. Minn. 2014); *Bobryk v. Durand Glass Manufacturing*

Co., No. 12-5360(NLH)(JS), 2014 U.S. Dist. LEXIS 137168, at *21 (D.N.J. Sept. 29, 2014); *Bowman v. Doe Run Resources Corp.*, No. 4:13 CV 2519 CDP, 2014 U.S. Dist. LEXIS 98333, at *19-*20 (E.D. Mo. July 21, 2014); *Hart v. Sandridge Energy, Inc.*, No. CIV-14-178-R, 2014 U.S. Dist. LEXIS 89314, at *10 (W.D. Okl. July 1, 2014); *Morris v. Alle Processing Corp.*, No. 08-CV-4874 (JMA), 2013 U.S. Dist. LEXIS 64534, at *43 (E.D.N.Y. May 6, 2013); *Barbosa v. Nat'l Beef Packing Co.*, No. 12-2311-KHV, 2013 U.S. Dist. LEXIS 12815, at *17 (D. Kan. Jan. 31, 2013); *Harvey v. AB Electrolux*, 857 F. Supp. 2d 815, 819-20 (N.D. Iowa 2012); *Baricuatro v. Industrial Personnel & Management Servs., Inc.*, No. 11-2777, 2012 U.S. Dist. LEXIS 161097, at *12 (E.D. La. Nov. 9, 2012); *Brooks v. Safety-Kleen Systems, Inc.*, No. 11 C 7245, 2012 U.S. Dist. LEXIS 117035, at *17 (N.D. Ill. Aug. 14, 2012); *Garner v. Butterball, LLC*, No. 4:10CV01025 JLH, 2012 U.S. Dist. LEXIS 21859, at *27 (E.D. Ark. Feb. 22, 2012); *Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV-SJ-FJG, 2012 U.S. Dist. LEXIS 24021, at *40 (W.D. Mo. Feb. 9, 2012); *Sanchez v. Creekstone Farms Premium Beef, LLC*, No. 11-4037-EFM-KGG, 2012 U.S. Dist. LEXIS 13458, at *11 (D. Kan. Feb. 6, 2012); *Morales v. Farmland Foods, Inc.*, No. 8:08cv504, 2012 U.S. Dist. LEXIS 7586, at *3-*4 (D. Neb. Jan. 24, 2012); *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 717 (E.D.N.C. 2011); *Harris v. Smithfield Packing Co.*, No. 4:09-CV-41-H(1), 2011 U.S. Dist. LEXIS 108976, at *11-*12 (E.D.N.C. Sept. 23, 2011); *Horne v. Smithfield Packing Co.*, No. 5:09-CV-42-H(1), 2011 U.S. Dist. LEXIS 108978, at *11 (E.D.N.C. Sept. 23, 2011); *Mitchell v. Smithfield Packing Co.*, No. 4:08-CV-182-H(1), 2011 U.S. Dist. LEXIS 108974, at *10-*11 (E.D.N.C. Sept. 23, 2011); *Curry v. Kraft Foods Global, Inc.*, No. 10 C 1288, 2011 U.S. Dist. LEXIS 102510, at *23-*24 (N.D. Ill. Sept. 12, 2011); *Smith v. Safety-Kleen Systems, Inc.*, No. 10 C 6574, 2011 U.S. Dist. LEXIS 40670, at *13-*14 (N.D. Ill. Apr. 14, 2011); *Acosta v. Tyson Foods, Inc.*, No. 8:08CV86, 2011 U.S. Dist. LEXIS 35152, at *3 (Mar. 30, 2011); *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2011 U.S. Dist. LEXIS 34623, at *3 (D. Neb. Mar. 30, 2011); *In re Tyson Foods, Inc., Fair Labor Standards Act Litigation*, 694 F. Supp. 2d 1372, 1380 (M.D. Ga. 2010); *McLaurin v. Prestage Foods*, 271 F.R.D. 465, 479 (E.D.N.C. 2010); *Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 297 (D. Neb. 2010); *Phelps v. Parsons Tech. Support, Inc.*, No. 2:09-0327-JMS-WGH, 2010 U.S. Dist. LEXIS

116166, at *18-*19 (S.D. Ind. Oct. 29, 2010); *Braun v. Superior Industries Int'l, Inc.*, No. 09-2560-JWL, 2010 U.S. Dist. LEXIS 102863, at *17 (D. Kan. Sept. 28, 2010); *Hosler v. Smithfield Packing Co.*, No. 7:07-CV-166-H, 2010 U.S. Dist. LEXIS 101912, at *4-*5 (E.D.N.C. Sept. 27, 2010); *Parker v. Smithfield Packing Co.*, No. 7:07-CV-176-H, 2010 U.S. Dist. LEXIS 101191, at *3 (E.D.N.C. Sept. 27, 2010); *Marshall v. Amsted Industries, Inc.*, No. 10-cv-0011-MJR-CJP, 2010 U.S. Dist. LEXIS 59549, at *19 (S.D. Ill. June 16, 2010); *Ford v. Townsends of Ark., Inc.*, No. 4:08cv00509 BSM, 2010 U.S. Dist. LEXIS 46093, at *26 (E.D. Ark. Apr. 9, 2010); *Reed v. County of Orange*, 266 F.R.D. 446, 463-64 (C.D. Cal. Jan. 8, 2010); *Johnson v. Koch Foods, Inc.*, 657 F. Supp. 2d 951, 953 (E.D. Tenn. 2009); *Perez v Mountaire Farms*, 601 F. Supp. 2d 670, 684 (D. Md. 2009); *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2009 U.S. Dist. LEXIS 116460, at *59 (E.D. Ark. Dec. 15, 2009); *Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 501 (D. Neb. Dec. 11, 2009); *Abadeer v. Tyson Foods, Inc.*, No. 3:09-00125, 2009 U.S. Dist. LEXIS 110685, at *39 (M.D. Tenn. Nov. 25, 2009); *Busler v. Energys Energy Products, Inc.*, No. 09-00159-CV-W-FJG, 2009 U.S. Dist. LEXIS 84500, at *13-*14 (W.D. Mo. Sept. 16, 2009); *Andrako v. U.S. Steel Corp.*, No. 07-1629, 2009 U.S. Dist. LEXIS 78788, at *16 (W.D. Pa. Sept. 2, 2009); *Garcia v. Tyson Foods, Inc.*, 255 F.R.D. 678, 693 (D. Kan. Feb. 12, 2009); *Musticchi v. Little Rock*, No. 4:08cv00419 SWW, 2009 U.S. Dist. LEXIS 120549, at *15 (E.D. Ark. Feb. 2, 2009); *Gil v. Solectron Corp.*, No. C-07-06414 RMW, 2009 U.S. Dist. LEXIS 3413, at *8-*13 (N.D. Cal. Jan. 9, 2009); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 962 (W.D. Wis. 2008); *Musch v. Domtar Industries, Inc.*, 252 F.R.D. 456, 463 (W.D. Wis. 2008); *Robinson v. Tyson Foods, Inc.*, 254 F.R.D. 97, 102 (S.D. Iowa 2008); *Spoerle v. Kraft Foods Global, Inc.*, 253 F.R.D. 434, 443 (W.D. Wis. 2008); *DeKeyser v. Thyssenkrupp Waupaca Foundry, Inc.*, No. 08-C-488, 2008 U.S. Dist. LEXIS 102318, at *14 (E.D. Wis. Dec. 18, 2008); *Cortez v. Nebraska Beef, Inc.*, No. 8:08CV90, 2008 U.S. Dist. LEXIS 95562, at *5 (D. Neb. Nov. 21, 2008); *Martinez-Hernandez v. Butterball, LLC*, No. 5:07-174-H(2), 2008 U.S. Dist. LEXIS 111931, at *15 (E.D.N.C. Nov. 14, 2008); *Daniel v. Quail Int'l, Inc.*, No. 3:07-CV-053 (CDL), 2008 U.S. Dist. LEXIS 61013, at *9 (M.D. Ga. Aug. 11, 2008); *Lopez v. Tyson Foods*, No. 8:06CV459, 2008 U.S. Dist. LEXIS 60050, at *10 (D. Neb. Aug. 7, 2008); *Owens v. Southern*

Notably, many of these decisions certified class actions and/or collective actions for employees at multiple facilities across the country. *See, e.g., In re*

Hens, Inc., No. 2:07cv28-KS-MTP, 2008 U.S. Dist. LEXIS 34817, at *13-*14 (S.D. Miss. Mar. 17, 2008); *In re Pilgrim's Pride F.L.S.A. Litigation*, MDL Docket No. 1:07-cv-1832, 2008 U.S. Dist. LEXIS 93966, at *10-*12 (W.D. Ark. Mar. 13, 2008); *Lugo v. Farmer's Pride Inc.*, No. 07-cv-00749, 2008 U.S. Dist. LEXIS 17565, at *10-*11 (E.D. Pa. Mar. 7, 2008); *Lopez v. Sam Kane Beef Processors, Inc.*, No. CC-07-335, 2008 U.S. Dist. LEXIS 15572, at *6 (S.D. Tex. Feb. 29, 2008); *Centurioni v. City & County of San Francisco*, No. C 07-01016 JSW, 2008 U.S. Dist. LEXIS 10856, at *11 (N.D. Cal. Feb. 1, 2008); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1014-15 (D. Minn. 2007); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2007 U.S. Dist. LEXIS 95439, at *3, *31 (N.D. Cal. Dec. 19, 2007); *Conerly v. Marshall Durbin Co.*, No. 2:06cv205KS-MTP, 2007 U.S. Dist. LEXIS 85994, at *32 (S.D. Miss. Nov. 6, 2007); *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 U.S. Dist. LEXIS 71179, at *39 (D. Minn. Sept. 24, 2007); *Olson v. Tesoro Refining & Marketing Co.*, No. C06-1311RSL, 2007 U.S. Dist. LEXIS 67747, at *25-*26 (W.D. Wash. Sept. 12, 2007); *Mims v. Carrier Corp.*, No. 2:06-CV-206, 2007 U.S. Dist. LEXIS 102270, at *11 (E.D. Tex. Sept. 11, 2007); *Dominquez v. Minn. Beef Industries, Inc.*, No. 06-1002 (RHK/AJB), 2007 U.S. Dist. LEXIS 61298, at *9 (D. Minn. Aug. 21, 2007); *Benbow v. Gold Kist, Inc.*, No. 3:06-cv-02751-MBS, 2007 U.S. Dist. LEXIS 102273, at *6-*7 (D.S.C. Apr. 16, 2007); *King v. Koch Foods of Miss.*, No. 3:06CV301TSL-JCS, 2007 U.S. Dist. LEXIS 26746, at *3-*11 (S.D. Miss. Apr. 10, 2007); *Dege v. Hutchinson Technology, Inc.*, No. 06-3754 (DWF/RLE), 2007 U.S. Dist. LEXIS 12471, at *6 (D. Minn. Feb. 22, 2007); *Aguilar v. Pilgrim's Pride Corp.*, No. CV-06-J-1673-NE, 2007 U.S. Dist. LEXIS 29168, at *12-*13 (N.D. Ala. Jan. 31, 2007); *Allen v. McWane, Inc.*, No. 2:06-CV-158 (TJW), 2006 U.S. Dist. LEXIS 81543, at *17 (E.D. Tex. Nov. 7, 2006); *Vogt v. Texas Instruments, Inc.*, No. 3:05-CV-2244-L, 2006 U.S. Dist. LEXIS 67226, at *13 (N.D. Tex. Sept. 19, 2006); *Albritton v. Cagles, Inc.*, No. 1:05-CV-74 (WLS), 2006 U.S. Dist. LEXIS 65027, at *5 (N.D. Ga. Sept. 11, 2006); *Carlson v. Leprino Foods Co.*, No. 1:05-CV-798, 2006 U.S. Dist. LEXIS 48589, at *17 (W.D. Mich. June 30, 2006).

Tyson Foods, Inc., Fair Labor Standards Act Litigation, 694 F. Supp. 2d at 1380 (holding that previously certified collective actions should remain certified with respect to eight (8) of defendant's chicken processing plants in six (6) states); *Gil*, 2009 U.S. Dist. LEXIS 3413, at *8-*13 (granting motion to conditionally certify collective action that included employees at seventeen (17) of defendant's facilities located across the nation); *In re Pilgrim's Pride Fair Labor Standards Act Litigation*, 2008 U.S. Dist. LEXIS 93966, at *10-*12 (granting consolidated motion to certify collective action that included current and former employees from twenty-one (21) different chicken processing plants spread across ten (10) states); *Benbow*, 2007 U.S. Dist. LEXIS 102273, at *6-*7 (granting motion for collective action certification for collective action involving all of defendant's chicken processing plants in Alabama, Georgia, South Carolina, North Carolina, and Florida).

Significantly, no appellate court reviewed the decision to certify a class action and/or a collective action in any of the above cases. Indeed, this Court has never specifically addressed the procedures and standard to be applied in determining whether an FLSA § 216(b) case should proceed as a collective action. Defendants typically must wait until a final judgment is entered in the case to appeal a class or collective action certification order. While 28 U.S.C. § 1292 provides that district courts can allow interlocutory appeals by certifying the issue to court of appeals in certain limited circumstances, the court of appeals then has discretion to allow the appeal. *See Swint v. Chambers Cnty Comm'm*, 514 U.S. 35, 47 (1995). Given these hurdles, "appellate review

of class certification decisions under § 1292(b) is and will be rare." *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998).

As a practical matter, the decision to certify a class or a collective action by a district court, even conditionally, places a great deal of economic pressure on employers, and thus often results in employers paying substantial sums to settle the case at that point. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (explaining that plaintiff's counsel "must think that like most class action suits this one would not be tried—that if we ordered a class or classes certified, DirectSat would settle."); William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-The-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform*, 19 Kan. J.L. & Pub. Pol'y 433, 451 (2010) (explaining that discovery costs for employers following conditional certification of a collective action, which "may be granted if the plaintiff does as little as make 'substantial allegations' showing possible FLSA violations can result in enormous pressure on defendants to settle"). Further illustrating this point, for the 12-month period ending March 31, 2014, only 1.4 percent of the thousands of FLSA cases filed reached trial. *See* Administrative Office of the United

States Courts, *Judicial Business of the United States Courts: 2014 Report of the Director*, Table C-4.[9]

Settlements of class wage and hour claims are often quite lucrative for plaintiffs' counsel, which incentivizes the plaintiffs' bar to bring these "professionally assembled class action[s]" and to assemble them to be as large as possible. Pet. App. at 115a (Beam, J., dissenting from rehr'g denial). The value of *only* the top ten private wage-and-hour class action settlements has been over $200 million every year from 2009 to 2014. *See Annual Workplace Class Action Litigation Report*, Seyfarth Shaw LLP, at 4 (2015 ed.). A significant portion of these settlement sums go to plaintiffs' counsel. *See, e.g., Morales v. Farmland Foods, Inc.*, No. 8:08CV504, 2013 U.S. Dist. LEXIS 56501, at *3, *38 (D. Neb. Apr. 18, 2013) (awarding plaintiffs' counsel over $2 million in fees despite the fact that the class only received $275,000 as part of the settlement); *In re Bank of Am. Wage & Hour Litig.*, No. 10-MD-2138-JWL, 2013 U.S. Dist. LEXIS 180056, at *21-*23 (D. Kan. Dec. 18, 2013) (approving $73 million settlement of FLSA and state law wage and hour class claims with $18.25 million of the settlement fund going to plaintiffs' counsel); *see also Garcia v. Tyson Foods, Inc.*, No. 06-2198-JTM, 2012 U.S. Dist. LEXIS 170177, at *25, *46 (D. Kan. Nov. 29, 2012) (awarding over $3.2 million in attorneys' fees on a judgment of $533,011 in a wage and hour class action).

Based on the above, it is evident that (1) wage and hour collective and class action litigation has exploded in recent years, (2) many of these cases involve

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[9] Available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx.

donning and doffing claims that are similar to the claims at issue here, (3) in the majority of cases, class or collective action certification is granted by district courts, and (4) these decisions granting certification are very rarely reviewed by federal appellate courts because certification places a great deal of pressure on employers to settle.

II. DISTRICT COURTS FREQUENTLY ADDRESS WHETHER DATA AND TESTIMONY FROM A SAMPLE OF EMPLOYEES CAN BE EXTRAPOLATED TO DETERMINE LIABILITY AND DAMAGES IN WAGE AND HOUR CLASS CASES.

As discussed in detail in Tyson's Petition, multiple circuit courts of appeals have confronted the issue of whether a class can be certified where liability and/or damages will be determined using information from a sample number of employees and have reached different and conflicting conclusions. *Compare Espenscheid*, 705 F.3d at 774-77 (rejecting plaintiffs' proposal "to get around the problem of variance" among class members regarding overtime pay due by using representative testimony at trial and thus affirming district court's ruling that decertified class), *with In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1257 (10th Cir. 2014) (affirming district court's grant of class certification where plaintiffs "proved" damages using an expert who applied average overcharges to disparate transactions).

In recent years, federal district courts have regularly dealt with these issues in wage and hour cases and likewise reach differing conclusions. *See, e.g., Johnson v. Wave Comm GR LLC*, 4 F. Supp. 3d 453, 461 (N.D.N.Y. 2014) (denying defendant's motion

to decertify class and explaining that plaintiffs "have established that the representative testimony they intend to introduce satisfied their burden of establishing a prima facie violation of the FLSA"); *Wilson v. Navika Capital Group, LLC*, No. 4:10-CV-1569, 2014 U.S. Dist. LEXIS 7181, at *53, *55 (S.D. Tex. Jan. 17, 2014) (deferring its ruling on defendant's motion for decertification, expressing "serious concerns with the fairness of using representative testimony on the issue of non-compensable pre- or post-liminary activities" and expressing "serious doubts that any form of 'representative' proof could fairly determine which employees were actually denied overtime compensation, let alone how much"); *Thompson v. Bruister & Assoc.*, No. 3:07-00412, 2013 U.S. Dist. LEXIS 139374, at *16-*20 (M.D. Tenn. Sept. 27, 2013) (granting defendant's motion to certify class decertification issue to the Court of Appeals for the Sixth Circuit where defendant argued that it would be improper to prove liability and damages for class using representative testimony);[10] *Farmer v. DirectSat USA, LLC*, No. 08 CV 3962, 2013 U.S. Dist. LEXIS 79825, at *20-*21 (N.D. Ill. June 6, 2013) (granting defendant's motion for decertification, rejecting plaintiffs' reliance on representative proof and explaining that "even if Plaintiffs could establish an 'average' number of overtime hours through representative proof, some technicians would receive a windfall while others would be undercompensated"); *Howard v. Securitas Sec. Servs. USA, Inc.*, No. 08 C 2746, 09 C

[10] The Sixth Circuit refused to consider the class certification decision on an interlocutory appeal, which further illustrates USPOULTRY's earlier point that appellate review of class certification decisions is extremely rare. *See Thompson*, No. 3:07-00412, at Docket Entry No. 941.

3633, 2013 U.S. Dist. LEXIS 44912, at *9-*10 (N.D. Ill. Mar. 28, 2013).

As another example, in *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 303 (E.D. Pa. 2010), the district court rejected plaintiffs' counsel's notion that he could prove class-wide liability through a time study by Dr. Mericle, much like the one he conducted in the present case, and decertified the class:

> The evidence indicates that there may be some hourly production workers who have legitimate claims of undercompensation for time spent donning and doffing, and some who may not; the evidence does not demonstrate, however, that the question of undercompensation can be answered in a manner common to all plaintiffs. If the present case were tried collectively and a verdict were reached for defendant, this result would be unfair to those plaintiffs who may have been denied pay owed them for donning and doffing; similarly, if a verdict were reached for plaintiffs, this would be unfair to defendant, who would be deemed liable as to the entire collective-action class when it may not have undercompensated all individual members of that class.

In *Childress v. Ozark Delivery of Missouri, LLC*, No. 6:09-cv-03133-MDH, 2014 U.S. Dist. LEXIS 173309 (W.D. Mo. Dec. 16, 2014), the district court considered a motion to exclude the expert testimony of Dr. Liesl Fox regarding issues of liability and damages with respect to FLSA claims asserted by a class of drivers alleging they were not compensated for all hours worked in violation of the FLSA, and the district court reached a conclusion that is inconsistent

with the district court's conclusion in *Lugo*. Dr. Fox is the same expert who was employed by class counsel in the present case to calculate claimed damages. In *Childress*, as in the present case, Dr. Fox relied on information from a select number of class members to calculate damages for the entire class. *Id.* at *6. Ozark argued that Dr. Fox's report and testimony should be excluded because it was improper to determine class-wide damages based on information regarding only *some* class members. *Id.* at *4. The court acknowledged that, in making her assessment, Dr. Fox assigned to class members "a fictitious number of overtime hours based upon the average number of overtime hours worked" by a sample set of employees. *Id.* at *11. However, the court ruled that Dr. Fox's testimony would be admissible. *Id.* at *25. In doing so, the court "recognize[d] the potential windfall associated with the extrapolation of data in these types of cases," but held that this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) "allows reasonable extrapolation in cases like the one before the Court." *Id.* at *12.

Properly reading and applying this Court's decision in *Mt. Clemens, in Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611 (S.D. Cal. 2014), the district court held that a class should not be certified based on a theory that a defendant's liability to all class members can be established through expert analysis of a sample of employees. In *Stiller*, plaintiffs alleged that, while Costco's supervisors and managers performed closing activities, they were "locked in" their respective stores after clocking out at the end of closing shifts and that they were not compensated for this "locked in" time in violation of state law and the FLSA. *Id.* at 615. A Rule 23 class and an FLSA collective action were previously certified, which included all employees

"who were subject to Costco's closing lockdown procedures" during the relevant time period. *Id.* at 614-15. In support of continued certification, plaintiffs provided testimony from over 100 employees stating they were locked in stores without compensation while managers and supervisors completed closing procedures. *Id.* at 616. Based on this and other evidence, the court noted that plaintiffs had established that Costco had a de facto policy of detaining employees in warehouses during closing procedures without pay. *Id.* at 624.

However, in granting Costco's decertification motion, the court explained that plaintiffs' evidence answered only the question of whether employees were sometimes detained without pay as a result of the policy, which was not enough to proceed to trial as a class on the FLSA and state wage-law claims. *Id.* at 625. As the court explained, "if it can only be determined on a classwide basis whether the Alleged Policy *sometimes* resulted in unpaid OTC time, individualized determinations will be required to determine the question of liability." *Id.* at 625 (emphasis added). This is because class-wide liability hinges on whether all employees in the class actually performed work for which they were not compensated. *Id.* The court explained further:

> Assuming Plaintiffs prove the existence of the Alleged Policy and that the Alleged Policy sometimes resulted in unpaid detention time, there is no classwide method of determining whether, how often, and for how long class members actually experienced unpaid OTC time as a result of the Alleged Policy. As such, liability cannot be proved on a classwide basis without thwarting Costco's ability to

> demonstrate that some class members, due to a variety of circumstances, did not actually experience unpaid OTC time despite being subject to the Alleged Policy.

Id. at 628.

Plaintiffs contended that they could establish common liability at trial using the results from an expert time-and-motion study measuring the time it would take certain individuals to conduct the activities that had to take place during the time that employees were being detained without pay to come up with an estimated average time. *Id.* The court explained that this type of study was not "an acceptable form of common proof of liability." The court rejected plaintiffs' reliance on this Court's decision in *Mt. Clemens* in support of such an approach, explaining as follows:

> The Court rejects Plaintiffs' assertion that the approach used in Mt. Clemens can be used here to establish, "as a matter of just and reasonable inference," the average frequency and length of detention time that the Alleged Policy caused. Again, Plaintiffs put the damages cart before the liability horse. Mt. Clemens first requires that an employee "prove[] that he has in fact performed work for which he was improperly compensated." Accordingly, while the Mt. Clemens approach may offer a classwide basis of proving damages, proving liability in this case first requires individuals to show they performed uncompensated "work" as a result of the Alleged Policy.

Id. at 629. Thus, the court granted Costco's motion to decertify the Rule 23 class and the FLSA class. *Id.* at 633.

III. THE EIGHTH CIRCUIT MISCONSTRUED *MT. CLEMENS* AND SHOULD HAVE DECERTIFIED THE CLASS.

It is USPOULTRY's position that the court in *Stiller* correctly applied *Mt. Clemens* in decertifying the class at issue and that the court of appeals and the district court in the present case misapplied *Mt. Clemens* in reaching the opposite result. In the present case, Plaintiffs claimed that Tyson violated the FLSA and Iowa law by failing to pay class members overtime pay. More specifically, Plaintiffs claimed that class members spent time engaging in donning and doffing and related activities without being provided adequate compensation, resulting in the class members working over 40 hours and therefore into unpaid overtime. In granting Plaintiffs' motion for conditional certification of a collective action, the district court agreed with Tyson that "there [we]re some very big factual differences" among the members in the proposed class given that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet. App. 87a. Nevertheless, the district court certified a 3,334-member Rule 23 class and a 444-member FLSA collective action because the "gang time compensation system" was a common policy that applied to all such members. Pet. App. 87a, 110-11a; Apdx.00684.

At trial, Plaintiffs relied on average donning, doffing, and walking times formulated by Dr. Mericle based on his study of a sample number of employees to

prove class-wide liability and damages. Pet. App. 5a. Dr. Mericle calculated an "average time" based on his study, and this "average time" was then applied to all class members even though Dr. Mericle acknowledged "a lot of variation" in his observed times between employees. Apdx. 0082-0083; Tr. 1158. Following trial, Tyson appealed to the Eighth Circuit Court of Appeals, contending that the class and collective action should not have been certified because questions of liability or damages were not "capable of classwide resolution . in one stroke." Dkt. 212-1 at 5 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (U.S. 2011)). Tyson argued further that to determine its liability based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated Tyson's right to demonstrate that *individual* class members were not entitled to overtime. Dkt. 237 at 5.

The Eighth Circuit rejected Tyson's arguments and affirmed the district court. Pet. App. 1a. The Eighth Circuit held that to apply Dr. Mericle's time study to "individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 . (1946)." *Id.* at 8a. As Tyson asserts in its petition, the Eighth Circuit has distorted this Court's holding in *Mt. Clemens*.

In *Mt. Clemens*, this Court explained that "[a]n employee who brings suit under § 16(b) of the [FLSA] for unpaid overtime compensation has the burden of proving that *he* performed work for which *he* was not properly compensated." 328 U.S. at 686-87 (emphasis added). This Court explained that once an employee meets his or her burden of establishing liability, the employee, in certain situations, can

establish the extent of his damages by "produc[ing] sufficient evidence to show the amount and extent of that [uncompensated] work as a matter of just and reasonable inference." *Id.* at 687. This Court was quite careful to explain that this diminished burden of proving damages as a matter of just and reasonable inference was appropriate only *because* the FLSA violation had already been established with respect to each employee:

> [S]uch a result [is not] to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damages is itself uncertain. But *here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute.* The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.

Id. at 688 (emphasis added); *see also O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 602-03 (6th Cir. 2009) ("*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are.").

In the present case, Plaintiffs were contending that each class member was denied proper overtime compensation in violation of the FLSA, which meant that, to prove liability, Plaintiffs had the burden to prove overtime work was performed without proper compensation by each class member. *See Mt. Clemens*, 328 U.S. at 686-87. Only after making such a showing

with respect to a particular class member could damages be established by just and reasonable inference with respect to the class member. *Id.* at 688. The Eighth Circuit, however, misapplied *Mt. Clemens* and incorrectly held that liability with respect to all class members could be established by just and reasonable inference through Dr. Mericle's study of a sample of employees and his resulting calculation of an "average time" that he applied to all class members. In doing so, the Eighth Circuit "put the damages cart before the liability horse" and sanctioned a class-wide verdict for a class that included at least 212 members to whom Tyson had no liability. *Stiller*, 298 F.R.D. at 629.

As discussed above, other courts have similarly misconstrued *Mt. Clemens* and other precedent from this Court and have certified wage and hour classes on the theory that liability to a class can properly be proved by extrapolating data from a sample number of employees. Currently, the procedural devices of class notice under § 216(b) and class certification under Rule 23 are being employed to overwhelm a defendant's ability to defend against claims on the merits. Without meaningful standards, defendants will continue to be denied the opportunity to defend against similar claims on the merits in the future. Given the frequency with which these issues arise and the conflicting rulings by lower courts, it is critical to USPOULTRY's members that this Court grant Tyson's petition and resolve the issues raised.

CONCLUSION

For the foregoing reasons, USPOULTRY requests that Tyson's petition for writ of certiorari be granted.

Respectfully submitted,

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April 20, 2015

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class includes hundreds of members who were not injured and have no legal right to any damages.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to express its view that federal courts should certify cases neither as class actions under Rule 23 of the Federal Rules of Civil Procedure, nor as collective actions under the Fair Labor Standards Act (FLSA), unless the plaintiffs can demonstrate that they have satisfied each of the requirements set forth in Rule 23 and the FLSA. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF has also repeatedly urged the judiciary to confine itself to deciding only true "cases or controversies" under Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

WLF is concerned that the decision below, by endorsing class certification based on estimates regarding the number of overtime hours a hypothetical "average" employee might have worked, deprives a defendant in a class or collective action of the right to litigate its statutory defenses to individual claims. Permitting class or collective claims to proceed in this manner is also unfair to those absent class members who worked more overtime hours than the "average" employee; under the appeals court's trial-by-formula approach, they may end up being undercompensated or even being classified as uninjured despite possessing evidence that they were not fully compensated for their overtime work.

WLF also believes the Court should grant review to ensure that Article III's threshold standing requirement applies with equal force to *all* class members. The Eighth Circuit erred as a matter of law by affirming certification of a class that created liability to uninjured plaintiffs, contravening the injury-in-fact requirement of Article III.

STATEMENT OF THE CASE

Respondents are employees of Petitioner Tyson Foods, Inc. at Tyson's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and the nearly identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq.*, by failing to fully compensate them (*i.e.*, failing to pay time-and-a-half) for all hours worked in excess of 40 hours per week.

In calculating compensable working time for its Storm Lake employees, Tyson includes all hours when employees are at their work stations and the production line is moving. Tyson also pays employees for the time it estimates they require to perform other work-related duties, including the donning and doffing of personal protection equipment (PPE). Respondents' lawsuit contends that those estimates are too low, that many employees require more than the estimated time to complete their donning and doffing. Respondents contend that they are entitled to additional overtime pay whenever the extra required work is performed during a week in which an employee has already worked 40 hours.[2]

It is undisputed that the quantity of PPE worn at the Storm Lake facility varies considerably from worker to worker, and thus that the time required to don and doff PPE also varies considerably. Tyson has adopted several measures designed to ensure that employees are fully compensated for their donning and doffing time as well as the time spent walking to their work locations. In particular, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most class members to compensate for donning/doffing-related activities. Also, employees assigned to come in early to set up or to stay late to tear down remained "on the clock" during those assignments, and they had ample opportunity during

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[2] Storm Lake employees are paid well in excess of the minimum wage. Thus, Respondents do not claim that Tyson's alleged failure to compensate them for all work time constituted a violation of the minimum-wage provisions of the FLSA and the IWPCL.

that compensated time period to complete all donning/doffing, cleaning, and walking activities. Depending on their work assignments, some employees were able to don and doff PPE during the regular work shift, and thus the time they spent on those activities was already included in their compensated time.

The considerable variation in time outside the regular work shift devoted by employees to donning and doffing would seem at first blush to preclude certification of a Rule 23(b)(3) class for Respondents' IWPCL claims (and of a collective action for their FLSA claims). Rule 23(b)(3) precludes certification unless "the questions of law or fact common to class members predominate over any questions affecting only individual members." The factual issues key to determining liability and damages—whether each employee spent more hours performing donning/doffing activity than the hours for which he was compensated and whether the employee worked more than 40 hours in any such week—would seem to require an individual-by-individual factual determination.

Respondents sought to avoid that problem by computing an average amount of time spent by each employee devoted to donning, doffing, and walking activity, based on a time study conducted by Dr. Kenneth Mericle. He observed a small sample of Tyson employees performing what he deemed to constitute donning and doffing activity. Extrapolating that observation to all employees, he concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which he worked) on donning, doffing, and walking

activity.[3] Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to see which employees had worked overtime and—based on Dr. Mericle's conclusions regarding the "average" employee— calculated what she believed was the additional overtime compensation owed by Tyson to the class as a whole.

In the district court, Tyson repeatedly voiced its objection to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to "trial by formula" and prevented it from litigating its defenses to individual claims. The district court nonetheless certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members. It also denied Tyson's repeated efforts to decertify. The jury found Tyson liable for failing to pay all required overtime for time spent on donning and doffing activity and awarded $2.9 million in damages to the class as a whole. After trial, the district court denied Tyson's renewed objections to class certification and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a.

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[3] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

A divided Eighth Circuit panel affirmed. *Id.* at 1a-24a. While conceding that "individual plaintiffs varied in their donning and doffing routines," the appeals court held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members worked more hours than the hours for which they were compensated. *Id.* at 12a. Rejecting Tyson's assertion that Dr. Mericle's study was incapable of providing a class-wide answer to the liability and damages questions, the court said that "using statistics or samples in litigation is not necessarily trial by formula." *Id.* at 10a-11. It cited this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 546 U.S. 21 (1946), to support its conclusion that the jury could infer both class-wide liability and damages from the study. *Id.* at 11a-13a.

Nor did the Court deem it significant that Respondents' own expert, Dr. Fox, concluded that a significant percentage of the plaintiff class did not work overtime (even when Dr. Mericle's "average" donning, doffing, and travel time were added to their time records) and thus could not establish liability or damages. *Id.* at 8a-9a. The court said, "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." *Id.* at 9a (citation omitted).

Judge Beam dissented. *Id.* at 14a-24a. He concluded that the class- and collective-action certifications were improper because—in light of the wide disparity in work performed by class members—a class-wide proceeding lacked "the capacity to generate common answers apt to drive the resolution of the litigation." *Id.* at 23a (quoting *Wal-Mart*, 131 S.

Ct. at 2251). He noted that, according to Respondents' own calculations, at least 212 class members could establish neither liability nor damages, and said that—given the jury's decision to award less than half the damages computed by Dr. Fox—it was likely that "more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* at 22a. The Eighth Circuit denied Tyson's petition for rehearing *en banc*; six judges voted to grant the petition. *Id.* at 114a.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the business community. The Eighth Circuit held that even when the claims of individuals are widely disparate, a trial court may manufacture common issues of fact by assuming that each individual's claims are identical to a hypothetical "average" plaintiff, and then base certification of class or collective actions on the manufactured common issue of fact. That holding is unfair to defendants because it denies them the opportunity to defend against actual, individual claims rather than the claims hypothesized by the trial court. It is also often unfair to absent class members, many of whose claims will end up being compromised for the sake of obtaining class certification.

Review is warranted because the Eighth Circuit's decision cannot be squared with this Court's decision in *Wal-Mart* and directly conflicts with a post-*Wal-Mart* decision from the Seventh Circuit. The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named

parties." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Departure from that general rule is permissible only when the requirements of Rule 23 have been met, requirements designed to ensure that the rights of all parties are fully protected and that certification does not modify existing rights.

By permitting this case to proceed as though the claims of all class members were identical to those of a hypothetical, "average" class member—thereby preventing Tyson from defending against the claims of individual class members—the Eighth Circuit violated the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Respondents' class-wide damage model significantly increases Tyson's potential damages above what it would incur if claims were litigated individually.

Moreover, by allowing liability and damages to be determined by statistical techniques that presume all class members are identical to the average observed in a sample, the appeals court improperly uses the class-action device to grant plaintiffs access to federal court without satisfying the "irreducible constitutional minimum of standing" under Article III. In doing so, the Eighth Circuit endorsed a class that includes *at least* 212 members who lack any injury traceable to the defendant's conduct. The Eighth Circuit's holding thus strips Article III of its vital gatekeeping function, which is critical to safeguarding the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

But this Court has been vigilant in ensuring that federal courts do not allow use of class-action procedures to adversely affect the substantive rights of any party. By permitting the expediency of the class-action device to substitute for actual, redressable harm caused by the defendant, the panel below effectively gutted Article III and required the defendant to litigate claims without being able to challenge the standing of uninjured class members. The district court's certification, and the Eighth Circuit's affirmance, of a class that includes numerous members who lack any cognizable injury is sharply at odds with this Court's historical understanding of Article III, and it runs contrary to the settled law of several circuits.

REASONS FOR GRANTING THE PETITION

I. CLASS CERTIFICATION IS IMPROPER WHERE THE ONLY COMMON ISSUE TYING TOGETHER DISPARATE CLASS MEMBERS IS THE HYPOTHESIZED DESCRIPTION OF AN "AVERAGE" CLASS MEMBER

The Eighth Circuit certified a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations among the employees in terms of hours worked time and working conditions. Indeed, the *only* relevant issues identified by the Eighth Circuit as common to the class were not contested and thus did not need to be adjudicated by the district court.[4] The appeals court

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[4] In an effort to distinguish *Wal-Mart*, the Eighth Circuit identified the following issues that supposedly tied the class

held that the absence of significant common issues could be overlooked and a class certified on the basis of a counter-factual presumption: that every class member engaged in the same amount of donning, doffing, and walking as the "average" employee. Respondents were permitted to demonstrate the amount of work performed by the "average" employee based on non-random observations of a small sample of employees. That holding cannot be squared with *Wal-Mart* and is in direct conflict with a post-*Wal-Mart* Seventh Circuit decision that rejected class certification in a wage-and-hour case with facts materially identical to the facts of this case. Review is warranted to resolve those conflicts.

A. The Class-Wide Issue that Served as the Basis for Class Certification Focused on a Hypothetical "Average" Employee

To obtain class certification in a case seeking damages (as here), a plaintiff must demonstrate, *inter alia*, that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or fact common to class members predominate over any

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together: "Unlike [*Wal-Mart*], Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike [*Wal-Mart*], class members worked at the same plant and used similar equipment." Pet. App. 8a. Those factual issues were uncontested by the parties. Indeed, uncontested issues such as whether putative class members all worked for one company were singled out in *Wal-Mart* as precisely the sort of issues that do *not* qualify as common issues for purposes of Rule 23(a)(2). *Wal-Mart*, 131S S. Ct. at 2551.

questions affecting only individual members." Rule 23(b)(3). *Wal-Mart* made clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.... Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

The Court has described Rule 23(b)(3)'s predominance requirement as "even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. at 1432. It imposes on courts a "duty to take a close look at whether common questions predominate over individual ones." *Ibid.*

Individual issues abound in this case. All agree that the number of hours—outside of regular work shifts—devoted to donning, doffing, and walking by Storm Lake employees varied considerably from employee to employee. Moreover, whether such work entitled a given employee to overtime compensation

depended entirely on whether that employee otherwise worked 40 or more hours during the week in question. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, what amount of damages are recoverable.

In contrast, the Eighth Circuit did not identify any issue of contested fact that is common to the class in the sense that its resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Instead, it presumed counterfactually that every employee performed the same amount of donning, doffing, and walking outside of regular work shifts, thus permitting the class trial to turn on whether Tyson had paid sufficient overtime wages to the hypothetical average employee.

B. The Eighth Circuit's Class Certification Decision Cannot Be Squared With *Wal-Mart* and Conflicts with a Post-*Wal-Mart* Decision from the Seventh Circuit

The effect of class certification in this case was to deprive Tyson of the ability to litigate its statutory defenses to individual claims. Once the district court held that Tyson's liability to the entire class turned on whether Tyson had paid sufficient overtime to the hypothetical average employee, it could no longer avoid liability by demonstrating that class counsel had failed to demonstrate that specific class members were inadequately compensated. As Tyson has explained, "In a class trial, . . . Tyson was reduced to attacking the

methodology used by plaintiffs' experts to determine the 'average' donning/doffing time." Pet. at 23.

Review is warranted because the decision to certify a plaintiff class under such circumstances cannot be squared with *Wal-Mart*. The Court explained in *Wal-Mart* that class certification under such circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. Under a trial plan approved by the Ninth Circuit in *Wal-Mart*, a master was to determine the liability and backpay claims of a small group of class members. The trial court would then extrapolate "the entire class recovery" (for a class of 1.5 million employees) from the verdicts rendered in those initial proceedings. In other words, Wal-Mart would not be permitted to contest the remaining 1.5 million claims by asserting that it did not discriminate against the specific employees in question. *Id.* This Court held that Rule 23 class certification could not be employed in that manner. It stated, "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*

In an effort to distinguish *Wal-Mart*, the Eighth Circuit said, "Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a. That effort to distinguish *Wal-Mart* is unavailing because it is based on a false premise: Respondents do, in fact, seek to "prove liability only for a sample set of class

members." Plaintiffs' claim rests entirely on Dr. Mericle's time study that purported to determine average donning and doffing time, and that study was based on a small, non-random sample of Tyson employees.[5]

The Petition demonstrates that the Eighth Circuit's endorsement of class certification conflicts with numerous circuit court decisions. One of those decisions (from the Seventh Circuit) merits special mention, both because of its factual similarity to this case and because it demonstrates that appeals courts have reached conflicting decisions regarding the meaning of *Wal-Mart*. In *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the Seventh Circuit affirmed class decertification in a case brought by individuals claiming that their employer failed to pay them time-and-a-half for overtime work. The Court concluded that Rule 23(b)(3) did not permit class counsel to litigate the claims of 2,341 putative class members based on the testimony of 42 "representative"

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[5] This Court's *Mt. Clemens* decision does not support the district court's reliance on sampling evidence as its basis for class certification. At issue in *Mt. Clemens* was the *legal* issue of whether employees' donning, doffing, and walking time was compensable under the FLSA, not the *factual* question of how much donning, doffing, and walking time there was. In concluding that the donning, doffing, and walking time of all employees was compensable, the Court examined the evidence submitted by eight employees regarding plant-wide working conditions. But the court did *not* attempt to extrapolate class-wide compensable time from the evidence submitted by the eight employees. Rather, it remanded the case so that the district court could determine class-wide compensable time in the first instance. *Mt. Clemens*, 328 U.S. at 691-94.

members of the class—in part because there was no evidence that the experiences of the 42 were representative of the class as a whole. *Id.* at 774.

Moreover, the Seventh Circuit held that class certification would be inappropriate *even if* their experiences were representative of the entire class because it is impermissible to award averaged damages to class members whose damages are not identical:

> To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity. And if the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) undercompensate him by half.

Id. The conflict between the Seventh and Eighth Circuits could not be starker. Both cases involved overtime claims under the FLSA; in both cases the parties understood that the relevant facts varied considerably from employee to employee. The Eighth Circuit permitted class certification in reliance on a study of a small, non-random sample of class members, based on the counterfactual presumption that every employee's experience was roughly similar to the

hypothetical "average" employee identified by the study. In contrast, the Seventh Circuit concluded that class certification is *never* permissible under such circumstances; it determined that, even if the 42 employees providing evidence were representative of the class as a whole, class certification would be inappropriate as a vehicle for awarding averaged damages that would overcompensate some and undercompensate others. Review is warranted to resolve this sharp inter-circuit conflict over a frequently recurring issue.

C. Review Is Warranted Because the Assumption that Every Employee's Claim Is Identical to That of the "Average" Employee Is Unfair to Absent Class Members

By certifying the class on the basis of a counter-factual presumption—that every employee devoted an identical number of hours (outside of regular work shifts) to donning, doffing, and walking—the decision below is also unfair to absent class members. Given the acknowledged wide disparity in time devoted to donning and doffing, by definition there will be a significant number of employees with above-average donning and doffing times and (if their work-weeks exceeded 40 hours) above-average overtime claims. As the Seventh Circuit pointed out, those above-average employees will be shortchanged if they are limited to an undifferentiated, per capita share of any class award. *Espenscheid*, 705 F.3d at 774.

Moreover, any distribution of a class award on the basis of Dr. Fox's calculations regarding who was injured could end up denying all recovery to some employees with potentially meritorious claims—*e.g.*, employees with above-average donning and doffing times but below-average overtime hours.[6] Such employees arguably are entitled to compensation if their above-average donning and doffing times are sufficient to push their total work per week above 40 hours. But because Dr. Fox's overtime calculations give them credit only for an average amount of donning and doffing time, Respondents' theory of liability might not credit them with overtime hours and thus would deny them any compensation claim.

One can understand why it is in the interest of plaintiffs' attorneys to average out the monetary claims of all class members; doing so arguably increases the chances of obtaining a lucrative class-certification order (at least it did here). But averaging out monetary claims will harm the interests of many of the attorneys' supposed clients. Rule 23(a)(4) prohibits

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[6] The author of the Eighth Circuit panel decision has suggested that, on remand, class members determined to be uninjured should not be included in the distribution of damages. *See* Pet. App. 131a (Opinion of Benton, J., respecting the denial of rehearing *en banc*) ("In this case, employees without damages are not entitled to allocation of the award."). WLF notes, however, that in light of the jury's decision to award lump-sum damages that were substantially less than the damages calculated by Dr. Fox, any distribution of the award among class members will be essentially arbitrary. As Judge Beam pointed out, it is impossible to determine who the jury thought was uninjured. Pet. App. 22a.

class certification unless counsel can demonstrate that (s)he "will fairly and adequately protect the interests of the class." Review is warranted to determine whether Rule 23(a)(4) bars class certification based on the counterfactual presumption that all class members possess the same characteristics as the hypothetical "average" class member.

Indeed, in light of the inherent conflict between class counsel and absent class members with above-average donning and doffing time, the latter would have a plausible claim that they are not bound by the judgment in this case. A court may not bind absent class plaintiffs to a judgment concerning money damages unless it provides "minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Those "minimal" protections include adequate representation "at all times" by the named plaintiffs and their counsel. *Id.* at 812. Review is warranted to determine whether class-action defendants should be subjected to class-action judgments that arguably are not equally binding on all members of the plaintiff class.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT ARTICLE III's INJURY-IN-FACT REQUIREMENT APPLIES TO ALL MEMBERS OF A CERTIFIED CLASS

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." To be justiciable, every suit brought in federal court must seek to redress an "injury in fact" caused by the defendant. *Whitmore v.*

Arkansas, 495 U.S. 149, 155 (1990). This Court has explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. ... First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" ... Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. ... And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted). A plaintiff thus lacks standing unless he has suffered "a distinct and palpable injury to himself." *Warth*, 422 U.S. at 501. This bedrock requirement of Article III jurisdiction "cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's injury-in-fact requirement is no "mere pleading requirement" but must be satisfied at each "stag[e] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Even under Rule 23, plaintiffs may aggregate only those claims that could be brought individually. That is why this Court has consistently held that class certification cannot provide individuals a right to relief in federal court that the Constitution would otherwise deny them if

they sued separately. *See, e.g., Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III's constraints.").

Rather than heed this Court's directives, the courts below ignored uncontested record evidence that substantial variations existed in the donning, doffing, and walking times of employees, who held different positions, used different combinations of equipment, and had different work routines. Despite the highly individualized donning, doffing, and walking times of class members, the district court simply assumed that every class member spent the same "averaged" amount of additional time on the job. Yet Respondents' own damages expert conceded that the class included over 212 members who suffered no injury whatsoever. *See* Pet. App. 22a, 122a. And because the jury issued an aggregate damages award *less than half* that requested by Respondents, it is likely that more than half of the putative class suffered no damages. *Id.* at 22a, 125a. Nevertheless, the district court included those uninjured plaintiffs in the aggregate damages award.

Trying a lawsuit on a class-wide basis is improper unless there is some feasible means of distinguishing injured class members from uninjured plaintiffs. Here there is none. As Judge Beam recognized in his dissent from the court's denial of

rehearing, the district court's "lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due to the limited number of members of the certified class with provable damages." Pet. App. 126a. And yet, "[n]either the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom." *Id.*

The deeply flawed decisions below thus sidestep "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. As a result, the growing prospect that class-action lawsuits will result in recovery for uninjured plaintiffs poses a serious threat—not only to this Court's precedents, but to the rule of law. "In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

Three circuits have squarely held that *all* members of a certified class must satisfy Article III standing to have their claims adjudicated in federal court. *See In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013) (requiring plaintiffs to show "that all class members were in fact injured by the alleged conspiracy"); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing."); *Denney v. Deutsche Bank* AG, 443 F.3d 253, 264 (2d Cir. 2006) (holding that the class must "be defined in such a way that anyone within it would have standing"). The

Eighth Circuit's decision in this case exacerbates an existing circuit split on this question, further underscoring the urgent need for this Court's discretionary review.[7]

Moreover, allowing uninjured persons to obtain recovery in federal court also violates the principle that the Federal Rules of Civil Procedure "do not extend" the "jurisdiction of the district courts." Fed. R. Civ. P. 82; *see Amchem*, 521 U.S. at 613; Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 398 (2014) ("Expanding [Article III] power to allow uninjured plaintiffs to litigate their claims in federal court solely because they are aggregated with others in a class action would violate the Rules Enabling Act, Rule 82, and due process.").

The question of whether a certified class may include individuals who lack an injury-in-fact under Article III is in desperate need of resolution by this Court. Although the Court has so far declined to

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[7] *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); *Kohen v. Pacific Investment Mgmt. Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009) ("[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."); *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 306-07 (3d Cir. 1998) ("Once threshold individual standing by the class representatives is met . . . there remains no further separate class standing requirement in the constitutional sense.").

answer that question, *see Carpenter Co. v. Ace Foam, Inc.*, 135 S. Ct. 1493 (2015); *and BP Exploration & Prod. Inc. v. Lake Eugenie Land & Develop., Inc.*, 135 S. Ct. 754 (2014), no good reason exists to allow this recurring problem to fester any longer.[5] Only this Court can provide a single, nationally uniform rule clarifying that district courts may not certify a class unless *all* members have suffered an injury caused by the defendant.

If anything, this case offers a more attractive vehicle than earlier petitions. Because this case was tried to verdict, here we know precisely the evidence Respondents used to "prove" class-wide injury and damages at trial. Rather than determine the actual damages of individual class members, Respondents relied on statistical techniques that improperly presumed that each class member was injured and should be awarded damages equal to the average observed in a sample. That egregious shortcut resulted in a lump-sum judgment to a class that includes hundreds of members who suffered no injury whatsoever. Given the increasing frequency with which lower federal courts have been willing to jettison the traditional threshold requirements of Article III,

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[5] The lower federal courts have also ignored Article III's injury-in-fact requirement in the context of congressionally created private rights of action. So far, that issue has likewise escaped the Court's review. *See Mut. First Fed. Credit Union v. Charvat*, 134 S. Ct. 1515 (2014) (denying petition for writ of certiorari); *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (per curiam) (dismissing writ of certiorari as improvidently granted); *cf. Spokeo, Inc. v. Robins*, No. 13-1339 (May 1, 2014) (petition for writ of certiorari pending).

review of the troubling class-certification decision below is particularly warranted.

It is beyond question that if any class member were to sue Tyson in an individual capacity in district court, he would need to satisfy Article III. But there is a constant temptation for district courts, which invariably face crowded dockets and finite resources, to adopt shortcut procedures designed to achieve quick resolution of cases raising similar issues. As this Court has cautioned, the "desire to obtain (sweeping relief) cannot be accepted as a substitute for compliance with [the standing requirements of Article III]." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (quoting *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 164 (1914)). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

In sum, the Court should grant review to prevent the lower federal courts from continuing to use Rule 23 as a mechanism to avoid the constitutional limits of Article III jurisdiction.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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April 20, 2015

No. 14-1146

SUPREME COURT, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR CERTIORARI FILED MARCH 19, 2015
CERTIORARI GRANTED JUNE 8, 2015

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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 14-1146 Petition For A Writ Of Certiorari at the following pages:

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
(WESTERN DIVISION)

Civil Docket For Case #: 5:07-cv-04009-JAJ

SHARP et al.

v.

TYSON FOODS, INC.,

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
		* * * *
02/06/2007	2	COMPLAINT AND JURY DEMAND *Class-Action* against Tyson Foods Inc, filed by Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A Montes, Jose A Garcia, Dale T Sharp, Courtney Knutson, Brian Fryar, Mike Sturtevant. Scheduling Report due by 6/19/2007 (Attachments: # 1 Civil Cover Sheet) (Smith, MacDonald) Modified on 2/7/2007 to add text as to jury demand (des,). (Entered: 02/06/2007)
		* * * *

DATE	#	DOCKET TEXT
03/31/2007	16	NOTICE by Dale T Sharp *Of Filing Additional Consents (100 Total) To Join Lawsuit Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Consents 1-20# 2 Exhibit B-Consents 21-40# 3 Exhibit C-Consents 41-60# 4 Exhibit D-Consents 61-80# 5 Exhibit E-Consents 81-100) (McCafferty, Brian) Modified on 4/2/2007 to note that filing attny's office has been contacted regarding the redaction of personal identifiers for future filings (src). (Entered: 03/31/2007)
03/31/2007	17	NOTICE by Dale T Sharp *Of Filing Additional Consents (100 Total) To Join Fair Labor Standards Act Lawsuit* (Attachments: # 1 Exhibit A-Consents 101-120 # 2 Exhibit B-Consents 121-140 # 3 Exhibit C-Consents 141-160 # 4 Exhibit D-Consents 161-180 # 5 Exhibit E-Consents 181-200)(McCafferty, Brian) (Entered: 03/31/2007)
03/31/2007	18	NOTICE by Dale T Sharp *Of Filing Additional Consents (97 Total) To Join Fair Labor Standards Act Lawsuit* (Attachments: # 1 Exhibit A-Consents 201-220 # 2 Exhibit B-Consents 221-240 # 3 Exhibit C-Consents 241-260 # 4 Exhibit D-Consents 261-280 # 5 Exhibit E-

DATE	#	DOCKET TEXT
		Consents 281-297)(McCafferty, Brian) (Entered: 03/31/2007)
04/30/2007	19	NOTICE by Dale T Sharp *Of Filing Additional Consents (19 TOTAL) To Join Lawsuit Filed Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Tyson Consents 298-316) (McCafferty, Brian) Modified on 5/1/2007 to note that filing attorney's office was contacted by QC Clerk regarding the redaction of personal identifiers Also Attorney Hamilton has not filed pro hac vice motion therefore he will not be added to the case although he is listed on the signature block. (src) (Entered: 04/30/2007)
		* * * *
08/03/2007	25	NOTICE by Dale T Sharp *Of Filing Additional Consents (8 TOTAL) to Join Action Under Fair Labor Standards Act* (Attachments: # 1 Exhibit A-Tyson Iowa Consents 317-324)(McCafferty, Brian) (Entered: 08/03/2007)
		* * * *
11/26/2007	28	MOTION for Protective Order (*Unopposed*) by Defendant Tyson Foods Inc. (Attachments: # 1 Exhibit A - Proposed Protective Order)(Balus, Allison) (Entered: 11/26/2007)

DATE	#	DOCKET TEXT
11/27/2007	29	ORDER granting 28 Unapposed Motion for Joint Stipulation For Protective Order. Signed by Chief Magistrate Judge Paul A Zoss on 11/27/07. (ak,) (Entered: 11/27/2007)
01/29/2008	32	MOTION for leave to file MOTIONS under Seal. Brian P McCafferty appearing for Plaintiff Dale T Sharp Motions referred to Paul A Zoss. (McCafferty, Brian) Modified on 1/30/2008 to edit text. (src) (Entered: 01/29/2008)
		* * * *
01/31/2008	33	ORDER granting 32 Motion for Leave to File Class Certification Motions Under Seal (see text of order). Signed by Judge Mark W Bennett on 01/31/08. (kfs) (Entered: 01/31/2008)
		* * * *
03/04/2008	41	MOTION to file under Seal *Defendant's Briefs and Index of Evidence* by Defendant Tyson Foods Inc (Balus, Allison) (Entered: 03/04/2008)
03/04/2008	42	ORDER Granting 41 Motion to File Defendant's Briefs and Index of Evidence Under Seal. Signed by Judge Mark W Bennett on 03/04/08. (kfs) (Entered: 03/04/2008)
		* * * *

DATE	#	DOCKET TEXT
03/11/2008	50	MOTION to file under Seal *Plaintiffs' Class Certification Reply Briefs* by Plaintiffs Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A Montes, Jose A Garcia, Dale T Sharp, Courtney Knutson, Brian Fryar, Mike Sturtevant (McCafferty, Brian) (Entered: 03/11/2008)
		* * * *
03/11/2008	52	ORDER granting 50 Motion to Seal. Signed by Judge Mark W Bennett on 03/11/08. (ak) (Entered: 03/11/2008)
		* * * *
03/26/2008	58	ORDER Granting 57 SEALED MOTION To Exceed Page Limits On Class Certification Reply Briefs. All attachments will be detached and docketed pursuant to Local Rule 7(h), and filed under seal pursuant to this court's order on March 11, 2008. Dkt. # 52. Signed by Judge Mark W Bennett on 3/26/08. (src) (Entered: 03/27/2008)
		* * * *
07/03/2008	62	Memorandum Opinion and Order granting as modified 34 Sealed Motion for conditional certification as a collective action, and 35 Sealed Motion for certification as a class action (See Order Text). Signed by

DATE	#	DOCKET TEXT
		Judge Mark W Bennett on 7/03/08. (copies emailed to all attorneys) (des). (Additional attachment added on 7/14/2008: # 1 Unsealed Memorandum Opinion and Order) Please note that the unsealed version is now attached per order at docket no. 69. (src) Modified on 1/19/2012 (src). (Entered: 07/03/2008)
		* * * *
07/14/2008	69	ORDER unsealing 62 Memorandum Opinion and Order on Plaintiffs' Motions for Collective Action and Class Action Certification. Signed by Judge Mark W Bennett on 07/14/08. (src) (Entered: 07/14/2008)
07/18/2008	70	NOTICE by Peg Bouaphakeo *Of Submission Of Plaintiffs' Proposed Class Notice Pursuant to The Court's July 3, 2008 Memorandum Opinion and Order* (Attachments: # 1 Exhibit A-Proposed Class Notice) (McCafferty, Brian) (Entered: 07/18/2008)
		* * * *
08/27/2008	77	ORDER REGARDING THE ISSUANCE OF COLLECTIVE ACTION AND CLASS ACTION NOTICE RE: 70 Notice and 73 Response (see text of order). Signed by Judge Mark W Bennett on 08/27/08. (Attachment #(1) Notice) (kfs) (Entered: 08/27/2008)

DATE	#	DOCKET TEXT
		* * * *
11/06/2008	81	ORDER REASSIGNING CASE. Case reassigned to Judge John A Jarvey for all further proceedings. Judge Mark W Bennett no longer assigned to case. Signed by Judge Mark W Bennett on 11/06/08. (copy of file to JAJ) (des) Modified on 11/7/2008 to edit text. (src) (Entered: 11/06/2008)
		* * * *
02/06/2009	86	NOTICE by Peg Bouaphakeo *Of Filing Additional Consents to Join Lawsuit (100 TOTAL) Pursuant to The Fair Labor Standards Act* (Attachments: # 1 Exhibit A- Storm Lake Opt-Ins 325-344, # 2 Exhibit B- Storm Lake Opt-Ins 345-364, # 3 Exhibit C- Storm Lake Opt-Ins 365-384, # 4 Exhibit D- Storm Lake Opt-Ins 385-404, # 5 Exhibit E- Storm Lake Opt-Ins 405-424) (McCafferty, Brian) (Entered: 02/06/2009)
02/09/2009	87	NOTICE by Peg Bouaphakeo *Of Filing Additional Consents (100 TOTAL) To Join Lawsuit Pursuant to the Fair Labor Standards Act* (Attachments: # 1 Exhibit A- Storm Lake Opt-Ins 425-444, # 2 Exhibit B- Storm Lake Opt-Ins 445-464, # 3 Exhibit C- Storm Lake Opt-Ins 465-484, # 4 Exhibit D- Storm Lake Opt-Ins 485-504, # 5 Exhibit E- Storm

DATE	#	DOCKET TEXT
		Lake Opt-Ins 505-524) (McCafferty, Brian) (Entered: 02/09/2009)
		* * * *
10/06/2010	149	NOTICE by Tyson Foods Inc *of Filing Rule 23 Opt-Out Letters* (Attachments: # 1 Exhibit 1 5) (Balus, Allison) (Entered: 10/06/2010)
		* * * *
10/07/2010	151	Proposed Jury Instructions by Tyson Foods Inc. (Attachments: # 1 Jury Verdict Form) (Mueller, Michael) (Entered: 10/07/2010)
		* * * *
10/13/2010	158	Proposed Jury Instructions by Tyson Foods Inc. (Sapp, Richard) (Entered: 10/13/2010)
10/14/2010	159	Proposed Jury Instructions by Tyson Foods Inc. (Sapp, Richard) (Entered: 10/14/2010)
10/14/2010	160	NOTICE by Peg Bouaphakeo of Filing Jointly Proposed Pretrial Order (Attachments: # 1 Jointly Proposed Pretrial Order, # 2 Exhibit Plaintiffs' Objections To Defendant's Trial Exhibits, # 3 Exhibit Defendants Objections to Plaintiffs' Trial Exhibits) (Wiggins, Robert) Modified on 10/15/2010 (bib). (Entered: 10/14/2010)
		* * * *

DATE	#	DOCKET TEXT
10/19/2010	162	MOTION to Amend/Correct *Its Answer to the Complaint* by Defendant Tyson Foods Inc (Attachments: # 1 Exhibit A - Amended Answer and Affirmative Defenses) (Mueller, Michael) (Entered: 10/19/2010)
		* * * *
07/01/2011	196	MOTION re 150 MOTION in Limine *Plaintiffs Motion To Allow A Trial Deposition of Dr. Adams and Withdrawal of their Motion In Limine to Exclude Dr. Adams* by Plaintiff Peg Bouaphakeo (Wiggins, Robert) (Entered: 07/01/2011)
		* * * *
07/11/2011	202	ORDER granting 162 Defendant's Motion to Amend its Answer to the Complaint. Clerk is directed to detach, file and docket the amended answer attached to the motion. Signed by Thomas J Shields on 7/11/2011. (pac) (Entered: 07/11/2011)
07/11/2011	203	AMENDED ANSWER to 2 Complaint by Tyson Foods Inc. (Filed by Clerk per 202 Order) (pac) (Entered: 07/11/2011)
		* * * *
07/25/2011	210	REPLY BRIEF to re 196 MOTION re 150 MOTION in Limine *Plaintiffs Motion To Allow A Trial Deposition of Dr. Adams and Withdrawal of their*

DATE	#	DOCKET TEXT
		Motion In Limine to Exclude Dr. Adams filed by Peg Bouaphakeo. (Wiggins, Robert) (Entered: 07/25/2011)
		* * * *
07/27/2011	212	MOTION for Decertification of Rule 23 Class by Defendant Tyson Foods Inc (Attachments: # 1 Brief Defendant's Memorandum of Law in Support of Its Motion for Decertification of Rule 23 Class, # 2 Exhibit 1 Filed Under Seal Cover Page Only for Report of Dr. Kenneth Mericle, # 3 Exhibit 2 - Excerpts from the Deposition Transcript of Dr. Kenneth Mericle, # 4 3 - Filed Under Seal Cover Page Only for Report of Dr. Leisl M. Fox) (Mueller, Michael) (Entered: 07/27/2011)
07/27/2011	213	MOTION to file under Seal *Defendant's Unopposed Motion to File Under Seal Exhibits 1 and 3 in Support of Its Motion for Decertification of Rule 23 Class* by Defendant Tyson Foods Inc (Mueller, Michael) (Entered: 07/27/2011)
		* * * *
08/19/2011	223	MOTION for Leave to File Overlength Brief *As To Plaintiffs' Opposition To Motion To Decertify Rule 23 Class* by Plaintiff Peg Bouaphakeo (Attachments: # 1 Brief, # 2 Exhibit 1, # 3

DATE	#	DOCKET TEXT
		Exhibit 2) (Wiggins, Robert) (Entered: 08/19/2011)
		* * * *
08/24/2011		TEXT ORDER granting 213 Motion to File Exhibits Under Seal; granting 223 Motion for Leave to File Overlength Brief. Signed by Thomas J Shields on 8/24/2011. (Action taken per TJS chambers) (pac) Modified text on 8/25/2011 (pac). (Entered: 08/24/2011)
08/24/2011	225	MOTION to file under Seal *Defendant's Unopposed Motion to File Under Seal Exhibits A through C in Support of Its Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23 Class* by Defendant Tyson Foods Inc (Mueller, Michael) (Entered: 08/24/2011)
08/24/2011	226	MOTION for Leave to File Overlength Brief - *Defendant's Unopposed Motion to Exceed Page Limitation of Its Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23* Class by Defendant Tyson Foods Inc (Attachments: # 1 Brief Defendant's Reply to Plaintiffs' Opposition to Motion to Decertify Rule 23 Class, # 2 Exhibit A - Filed Under Seal Cover Page, # 3 Exhibit B - Filed Under Seal Cover Page, # 4 Exhibit C Filed Under Seal Cover Page, # 5 Exhibit D Lopez Jury

DATE	#	DOCKET TEXT
		Verdict Form, # 6 Exhibit E Summary of Key Testimony of Dr. Fox) (Mueller, Michael) (Entered: 08/24/2011)
08/25/2011	227	RESISTANCE to Motion re 212 MOTION for Decertification of Rule 23 Class filed by Peg Bouaphakeo. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Filed by Clerk per text order) (pac) (Entered: 08/25/2011)
08/25/2011	228	ORDER denying 212 Motion for Decertification of Rule 23 Class. Signed by Judge John A Jarvey on 8/25/2011. (Cavanagh, Maura) (Entered: 08/25/2011)
09/01/2011	229	ORDER on Final Pre-Trial Conference. (See text of order) Signed by Chief Magistrate Judge Thomas J Shields on 9/1/2011. (pac) (Entered: 09/01/2011)
		* * * *
09/01/2011	233	MOTION to Exclude Any Reference to Dr. Paul Adams, or His Opinions, at Trial by Defendant Tyson Foods Inc (Attachments: # 1 Brief Memorandum in Support, # 2 Exhibit A Fox Deposition Excerpts, # 3 Exhibit B Mericle Deposition Excerpts, # 4 Exhibit C Excerpts from 5/18/2011 Lopes v. Tyson Foods Trial Transctript, # 5 Exhibit D - Excerpts from 5/19/2011 Lopes v. Tyson Foods Trial Transcript, # 6 Exhibit E E-

DATE	#	DOCKET TEXT
		mail chain dated 6/03/2011) (Mueller, Michael) (Entered: 09/01/2011)
09/01/2011	234	*Plainiffs' Brief On Admissibility Of Defendant's Exhibits From Dr. Adams' Time Study* by Peg Bouaphakeo (Wiggins, Robert) Modified on 9/2/2011 to link to 233 (src) (Entered: 09/01/2011)
		* * * *
09/02/2011	236	TEXT ORDER granting 225 Motion to Seal Defendant's Exhibits A through C in Support of its Reply; granting 226 Motion for Leave to File Overlength Brief. The Clerk is directed to detach and separately file Defendant's brief and its attachments. Signed by Chief Magistrate Judge Thomas J Shields on 9/2/2011. (Action taken per TJS chambers) (pac) (Entered: 09/02/2011)
09/02/2011	237	REPLY BRIEF re 212 MOTION for Decertification of Rule 23 Class filed by Tyson Foods Inc. (Attachments: # 1. Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Filed by Clerk per 236 Order) (pac) (Entered: 09/02/2011)
09/02/2011	238	TEXT MINUTE Entry for proceedings held before Judge John A Jarvey: Final Pretrial Conference held on 08/25/2011. Docketed by Clerk

DATE	#	DOCKET TEXT
		pursuant to direction from JAJ chambers. (src) (Entered: 09/02/2011)
		* * * *
09/21/2011	270	MOTION for Judgment as a Matter of Law *and Motion to Decertify* by Defendant Tyson Foods Inc Responses due by 10/11/2011 (Attachments: # 1 Brief, # 2 Exhibit A Garcia v. Tyson Foods, # 3 Exhibit B Lugo v. Farmer's Pride) (Mueller, Michael) (Entered: 09/21/2011)
09/22/2011	271	BRIEF in Opposition re 270 MOTION for Judgment as a Matter of Law *and Motion to Decertify (Brief Addresses Meal Break Portion of the Motion)* filed by Peg Bouaphakeo. (McCafferty, Brian) (Entered: 09/22/2011)
09/22/2011	272	RESISTANCE to Motion re 270 MOTION for Judgment as a Matter of Law *and Motion to Decertify (Resistance is Specifically to Defendant's Motion to Decertify)* filed by Peg Bouaphakeo. (McCafferty, Brian) (Entered: 09/22/2011)
09/23/2011	273	MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* by Plaintiff Peg Bouaphakeo Responses due by 10/11/2011 (McCafferty, Brian) (Additional attachment(s) added on 9/26/2011: # 1 Brief in Support) (pac). (Entered: 09/23/2011)

DATE	#	DOCKET TEXT
09/23/2011	274	*THIS HAS BEEN ATTACHED TO THE MOTION AT 273* Brief in Support re 273 MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* filed by Peg Bouaphakeo. (McCafferty, Brian) Modified on 9/26/2011 to attach to motion (pac). (Entered: 09/23/2011)
		* * * *
09/26/2011	277	Final Jury Instructions signed by Judge Judge John A Jarvey on 9/23/2011. (Cavanagh, Maura) (Entered: 09/26/2011)
		* * * *
09/26/2011	280	JURY VERDICT in favor of Plaintiffs Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, individually and on behalf of others similarly situated against Defendant, Tyson Foods, Inc. (Attachments: # 1 Unredacted Verdict) (djs) (Entered: 09/26/2011)
09/26/2011	281	JUDGMENT in favor of Plaintiffs, Brian Fryar, Courtney Knutson, Dale T Sharp, Heribento Renteria, Javier Frayre, Jesus A Montes, Jose A Garcia, Mario Martinez, Mike Sturtevant, Peg Bouaphakeo against Defendant, Tyson Foods Inc, in the amount of Two Million Eight Hundred Ninety-Two Thousand, Three Hundred

DATE	#	DOCKET TEXT
		Seventy-Eight Dollars and Seventy Cents ($2,892,378.70). Signed by Clerk on 9/26/11. (djs) (Entered: 09/26/2011)
09/26/2011	282	MOTION to Include Liquidated Damages in Final Judgment by Plaintiff Peg Bouaphakeo (Wiggins, Robert) Modified text on 9/27/2011 (pac). (Entered: 09/26/2011)
		* * * *
09/27/2011	294	JURY QUESTION to the Court and COURT'S ANSWER to the jury. (Cavanagh, Maura) (Entered: 09/27/2011)
		* * * *
09/27/2011	297	Witness and Exhibit List in case Sharp et al v. Tyson Foods Inc. (Attachments: # 1 Pl's Ex P-15, # 2 Pl's Ex P-23, # 3 Pl's Ex P-25, # 4 Pl's Ex P-45, # 5 Pl's Ex P-52, # 6 Pl's Ex P-66, # 7 Pl's Ex P-71, # 8 Pl's Ex P-77, # 9 Pl's Ex P-86, # 10 Pl's Ex P-88, # 11 Pl's Ex P-90, # 12 Pl's Ex P-92, # 13 Pl's Ex P-129, # 14 Pl's Ex P-145, # 15 Pl's Ex P-146, # 16 Pl's Ex P-153, # 17 Pl's Ex P-155, # 18 Pl's Ex P-166, # 19 Pl's Ex P-170, # 20 Pl's Ex P-173, # 21 Pl's Ex P-174, # 22 Pl's Ex P-205, # 23 Pl's Ex P-219, # 24 Pl's Ex P-222, # 25 Pl's Ex P-223, # 26 Pl's Ex P-224, # 27 Pl's Ex P-226, # 28 Pl's Ex P-227, # 29 Pl's Ex P-228, # 30 Pl's Ex P-230,

DATE	#	DOCKET TEXT
		# 31 Pl's Ex P-232, # 32 Pl's Ex P-233, # 33 Pl's Ex P-237, # 34 Pl's Ex P-239 (236), # 35 Pl's Ex P-242, # 36 Pl's Ex P-287, # 37 Pl's Ex P-288, # 38 Pl's Ex P-301, # 39 Pl's Ex P-316, # 40 Pl's Ex P-317, # 41 Pl's Ex P-320, # 42 Pl's Ex P-344, # 43 Pl's Ex P-345, # 44 Pl's Ex P-346, # 45 Pl's Ex P-348, # 46 Pl's Ex P-349 (thumb drive housed in clerk's office), # 47 Pl's Ex P-350, # 48 Def's Ex D-2013, # 49 Def's Ex D-2015, # 50 Def's Ex D-2023, # 51 Def's Ex D-2024, # 52 Def's Ex D-2033, # 53 Def's Ex D-2082, D-2089, D-2090, D-2092, D-2093, D-2104, D-2106, D-2117, D-2120, D-2123, D-2126, D-2127, D-2181, D-2182, D-2183, D-2184, D-2185, D-2187, D-2188, D-2189, D-2191, D-2192, D-2233-1, D-2233-2, D-2233-4, D-2233-5, D-2233-6, D-2233-7, D-2233-8, D-2241, D-2249, D-2250, D-2251, D-2252, D-2255, D-2256 (housed in clerk's office), # 54 Def's Ex D-2232-01, # 55 Def's Ex D-2232-06, # 56 Def's Ex D-2232-07, # 57 Def's Ex D-2232-12, # 58 Def's Ex D-2232-14, # 59 Def's Ex D-2232-17, # 60 Def's Ex D-2232-18, # 61 Def's Ex D-2232-19, # 62 Def's Ex D-2232-21, # 63 Def's Ex D-2232-35, # 64 Def's Ex D-2232-37, # 65 Def's Ex D-2232-39, # 66 Def's Ex D-2232-41, # 67 Def's Ex D-2232-42, # 68 Def's Ex D-2232-43, # 69 Def's Ex D-2232-44, # 70 Def's Ex D-2232-45,

DATE	#	DOCKET TEXT
		# 71 Def's Ex D-2232-48, # 72 Def's Ex D-2232-50, # 73 Def's Ex D-2253, # 74 Def's Ex D-2270, # 75 Def's Ex D-2271, # 76 Def's Ex D-2272, # 77 Def's Ex D-2273, # 78 Def's Ex D-2274, # 79 Def's Ex D-2280, # 80 Def's Ex D-2281, # 81 Def's Ex D-2282, # 82 Def's Ex D-2282, # 83 Def's Ex D-2290, # 84 Def's Ex D-2295, # 85 Def's Ex D-2300, # 86 Def's Ex D-2301, # 87 Def's Ex D-2302) (djs) (Entered: 09/27/2011)
09/27/2011	298	NOTICE of Filing of Electronic Transcript: Administrative Order attached: Please read for instructions for actions parties/counsel may be required to take re 283 Trial Day 1 Transcript, 284 Trial Day 2 Transcript, 285 Trial Day 3 Transcript, 286 Trial Day 4 Transcript, 287 Trial Day 5 Transcript, 288 Trial Day 6 Transcript, 289 Transcript of Proceedings, 290 Trial Day 7 Transcript, 291 Trial Day 8 Transcript, 292 Trial Day 9 Transcript and 293 Transcript of Proceedings: Jury Question and Jury Verdict. (pac) (Entered: 09/27/2011)
09/27/2011	299	RESPONSE by Tyson Foods Inc re 273 MOTION for Judgment as a Matter of Law *Pursuant to Rule 50* (Attachments: # 1 Exhibit A – Garcia

DATE	#	DOCKET TEXT
		v. Tyson Foods, Inc., Summary Judgment Opinion) (Mueller, Michael) Modified text on 9/28/2011 (pac). (Entered: 09/27/2011)
		* * * *
10/24/2011	305	MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decertify or, in the Alternative, for a New Trial on Damages)* by Defendant Tyson Foods Inc Responses due by 11/10/2011 (Mueller, Michael) (Entered: 10/24/2011)
		* * * *
11/15/2011	310	RESISTANCE to 305 MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decerti or, in the Alternative, for a New Trial on Damages)* filed by Peg Bouaphakeo. (Filed by Clerk per 309 Text Order) (pac) (Entered: 11/15/2011)
		* * * *
12/01/2011	313	REPLY BRIEF to 305 MOTION for Directed Verdict *(Defendant's Renewed Motion for Judgment as a Matter of Law and Motion to Decertify or, in the Alternative, for a New Trial on Damages)* by Tyson Foods Inc. (Filed

DATE	#	DOCKET TEXT
		by Clerk per 312 Text Order) (pac) Modified on 12/1/2011
		* * * *
01/13/2012	315	NOTICE of Supplemental Authority in Support of 305 Renewed Motion for Judgment as a Matter of Law and Motion to Decertify by Tyson Foods Inc. (Mueller, Michael) Modified on 1/17/2012 to add link (pac). (Entered: 01/13/2012)
09/26/2012	316	ORDER denying 305 Motion for Directed Verdict. Signed by Judge John A Jarvey on 09/26/2012. (Cavanagh, Maura) (Entered: 09/26/2012)
		* * * *
11/08/2012	329	ORDER GRANTING re 282 MOTION to Include Liquidated Damages in Final Judgment filed by Peg Bouaphakeo Signed by Judge John A Jarvey on 11/08/2012. (Cavanagh, Maura) (Entered: 11/08/2012)
11/09/2012	330	AMENDED JUDGMENT in favor of Brian Fryar, Courtney Knutson, Dale T Sharp, Heribento Renteria, Javier Frayre, Jesus A Montes, Jose A Garcia, Mario Martinez, Mike Sturtevant, Peg Bouaphakeo against Tyson Foods Inc in the amount of $5,785,757.40. Signed by Clerk on 11/9/2012. (pac) (Entered: 11/09/2012)

DATE	#	DOCKET TEXT
		* * * *
11/16/2012	334	NOTICE of Appeal re 330 Amended Judgment by Tyson Foods Inc. Filing fee $ 455, receipt number 0862-1504727. (Attachments: # 1 Exhibit Appelllant's Form A) (Mueller, Michael) Modified to add link on 11/19/2012 (skm). (Entered: 11/16/2012)
		* * * *

U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

12-3753

PEG BOUAPHAKEO, et al

v.

TYSON FOODS, INC,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/19/2012	Civil case docketed. [3976201] [12-3753] (PSA)
	* * * *
02/13/2013	RECORD FILED APLNT/PET APPENDIX, 5 volumes, Location STL, 1 box, Comments: 3 copies [4005274] [12-3753] (MER)
02/14/2013	BRIEF FILED APPELLANT BRIEF filed by Tyson Foods. w/service 02/13/2013, Length: 11,938 words
	10 COPIES OF PAPER BRIEFS FROM Tyson Foods due 02/19/2013 WITH revised certificate of service for paper briefs.
	Brief of Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario

DATE	PROCEEDINGS
	Martinez, Jesus A. Montes and Heribento Renteria due on 03/18/2013 [4005057] [12-3753] (MER)
02/14/2013	ADDENDUM of APPELLANT FILED by Appellant Tyson Foods. w/service 02/08/2013 [4005061][12-3753] (MER)
	* * * *
04/19/2013	RECORD FILED APLEE/RES APPENDIX, 1 volume, Location STL, Comments: 3 copies [4028831] [12-3753] (MER)
	* * * *
04/30/2013	ADDENDUM of APPELLEE FILED by Appellees Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria, w/service 04/29/2013 [4030 675] [12¬3753] (MER)
04/30/2013	BRIEF FILED APPELLEE BRIEF filed by Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria, w/service 04/29/2013, Length: 13,996 words
	10 COPIES OF PAPER BRIEFS FROM Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria due 05/06/2013 WITH revised certificate of service for paper briefs. Reply brief of Tyson Foods

DATE	PROCEEDINGS
	due on 05/14/2013. [4030685] [12-3753] (MER)
	* * * *
06/05/2013	BRIEF FILED - APPELLANT REPLY BRIEF filed by Tyson Foods. w/service 06/04/2013, Length 6,948 words
	10 COPIES OF PAPER BRIEFS FROM Tyson Foods due 06/10/2013 WITH revised certificate of service for paper briefs [4042305] [12-3753] (MER)
	* * * *
02/11/2014	ARGUED & SUBMITTED in St. Paul to Judges Lavenski R. Smith, C. Arlen Beam, Duane Benton on 02/11/2014 Mr. Michael J. Mueller for Appellant Tyson Foods and Mr. Robert L. Wiggins, Jr. for Appellees Mario Martinez, Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Jesus A. Montes and Heribento Renteria. Rebuttal by Mr. Michael J. Mueller for Tyson Foods RECORDED [4122794] [12-3753] (JMM)
08/25/2014	OPINION FILED THE COURT: Lavenski R. Smith, C. Arlen Beam and Duane Benton AUTHORING JUDGE: Duane Benton (PUBLISHED), DISSENT BY: C. Arlen Beam [4189089] [12-3753] (MDS)

DATE	PROCEEDINGS
08/25/2014	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. LAVENSKI R. SMITH, C. ARLEN BEAM and DUANE BENTON Hrg Feb 2014 [4189102] [12-3753] (MDS)
	* * * *
09/22/2014	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Tyson Foods w/service 09/22/2014 [4198917] [12-3753] (TW)
09/25/2014	JUDGE ORDER: A petition for rehearing has been filed by the Appellant in the above case. The court requests a response to the petition. The response is limited to fifteen pages and should be filed electronically. Response due on 10/06/2014 by Appellees Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes and Heribento Renteria. [4200253] [12-3753] (MDS)
	* * * *
10/09/2014	RESPONSE in opposition to petition for enbanc rehearing [4198917-2], petition for rehearing by panel [4198917-3] filed by Attorney Mr. Robert L. Wiggins, Jr. for Appellees Mario Martinez, Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Jesus A. Montes and Heribento Renteria,

DATE	PROCEEDINGS
	w/service 10/09/2014. [4205231] [12-3753] (RLW)
	* * * *
11/19/2014	JUDGE ORDER: The petition for rehearing en banc is denied. The petition for panel rehearing is also denied. Chief Judge Riley, Judge Wollman, Judge Loken, Judge Gruender, and Judge Shepherd would grant the petition for rehearing en banc. Judge Beam would grant panel rehearing. Judge Beam dissented to the denial of rehearing by the panel. Judge Benton wrote separately. [4198917-2] [4198917-3] PUBLISHED ORDER. [4217916] [12-3753] (MER)
	* * * *
12/03/2014	MANDATE ISSUED. [4221960] [12-3753] (MDS)
	* * * *
06/08/2015	SUPREME COURT order filed granting cert petition. Order filed on 06/08/2015 in case No. 14-1146. [4283 235] [12-3753] (SRD)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION-SIOUX CITY

[Filed: 02/06/07]

Docket No. c07-4009 MWB

DALE T. SHARP, COURTNEY KNUTSON, BRIAN FRYAR, MIKE STURTEVANT, MARIO MARTINEZ, PEG BOUAPHAKEO, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

Complaint-Class Action

JURY TRIAL DEMANDED

ORIGINAL CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT

Plaintiffs, by and through their undersigned counsel, on behalf of themselves and other similarly situated individuals either currently or formerly employed by Defendant Tyson Foods, Inc. (hereafter referred to as "Tyson"), at its meat processing facilities in Denison, Iowa and Storm Lake, Iowa, for their Class Action and

Representative Action Complaint against Tyson allege, upon information and belief, except as to the allegations that pertain to the named Plaintiffs and their counsel, which are based upon personal knowledge, as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to Federal Rule of Civil Procedure 23 by Plaintiffs on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa for the purpose of obtaining relief under Iowa law for, *inter alia*, unpaid wages and unpaid overtime wages.

2. The named Plaintiffs also bring a representative action against Tyson under federal law pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa for unpaid wages and unpaid overtime wages, liquidated damages, costs, attorneys' fees, and declaratory and injunctive relief.

3. At all times relevant to this Complaint, Plaintiffs have worked at Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa.

4. During the class period in this case, Tyson has failed to pay Plaintiffs their minimum hourly rate of pay for all hours of work they performed in addition to overtime as required by federal law. The uncompensated time includes, hut is not limited to, time spent preparing, donning, doffing, obtaining and sanitizing sanitary and safety equipment and clothing, obtaining

tools, equipment and supplies necessary for the performance of their work, "working" steels and all other activities in connection with these job functions, and walking between work sites after the first compensable work activity and before the last compensable work activity. These unpaid work activities took place before and after paid time, and during both paid breaks and unpaid lunch breaks.

5. At all times relevant to this Complaint, upon information and belief, Defendant Tyson has only paid certain "mesh wearing" employees at its Denison, Iowa and Storm Lake, Iowa meat processing facilities four (4) minutes per day for "clothes changing" time, despite the fact that Plaintiffs spend as much as 30-35 minutes or more per day performing uncompensated work activities as described in this Complaint.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over Plaintiffs' federal claims because they are brought pursuant to the Fair Labor Standards Act, 29 U.S.C. 216 (b), and because they raise a federal question pursuant to 28 U.S.C. § 1331. This Court also has jurisdiction in this matter over Plaintiffs' state law class claims pursuant to 28 U.S.C. § 1332(d) since the matter is a class action in which the aggregate claims of the individual class members exceeds the sum or value of $5,000,000 exclusive of interest and costs and Defendant Tyson is a citizen of the State of Delaware as defined by 28 U.S.C. 1332(c), since Tyson Foods, Inc. is a Delaware corporation whose principal place of business is in Springdale, Arkansas.

7. Venue is proper in this federal judicial district pursuant to 28 U.S.C. 1391(a) and (c), because a substantial part of the events or omissions giving rise to

these claims occurred within this judicial district, and because Defendant Tyson resides in this judicial district in that it regularly conducts business within this judicial district and thus is subject to personal jurisdiction within this judicial district.

III. PARTIES

8. Plaintiff Dale T. Sharp is a current Tyson employee at the Denison, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Sharp presently resides at *** Denison, IA 51442.

9. Plaintiff Courtney Knutson is a current Tyson employee at the Denison, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Knutson presently resides at *** Deloft, IA 51441.

10. Plaintiff Brian Fryar is a former Tyson employee at the Denison, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around November 2005. Plaintiff Fryar presently resides at *** Denison, IA 51442.

11. Plaintiff Mike Sturtevant is a former Tyson employee at the Denison, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around July 2005. Plaintiff Sturtevant presently resides at *** Denison, IA 51442.

12. Plaintiff Mario Martinez is a former Tyson employee at the Storm Lake, Iowa meat processing facility who was employed during the relevant class period in this case and left Tyson in or around February 2006. Plaintiff Martinez presently resides at *** Storm Lake, IA 50588.

13. Plaintiff Peg Bouaphakeo is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Bouaphakeo presently resides at *** Storm Lake, IA 50588.

14. Plaintiff Javier Frayre is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Frayre presently resides at *** Storm Lake, IA 50588.

15. Plaintiff Heribento Renteria is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Renteria presently resides at *** Storm Lake, IA 50588.

16. Plaintiff Jesus A. Montes is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Montes presently resides at *** Storm Lake, IA 50588.

17. Plaintiff Jose A. Garcia is a current Tyson employee at the Storm Lake, Iowa meat processing facility employed during the relevant class period in this case. Plaintiff Montes presently resides at *** Storm Lake, IA 50588.

18. Plaintiffs bring this class action for their state law claims on behalf of themselves and all other similarly situated current and former production and support employees of Defendant Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa ("Class members"). Moreover, the named Plaintiffs assert federal claims under the Fair Labor Standards Act as a representative action pursuant to 29 U.S.C.

§ 216(b), on behalf of themselves and all other similarly situated current and former employees who work or worked at Tyson's meat processing facilities located in Denison, Iowa and Storm Lake, Iowa.

19. Defendant Tyson Foods, Inc. is a Delaware corporation that operates numerous meat processing facilities throughout the United States including facilities in Denison, Iowa (located in Crawford County) and Storm Lake, Iowa (located in Buena Vista County). Defendant Tyson is a corporation engaged in interstate commerce and in the production of goods for commerce throughout the United States. Defendant Tyson can be served with original service of process through its agent for service, CT Corporation System, 1515 Market Street, 12th Floor, Philadelphia, PA 19102.

IV. CLASS ACTION ALLEGATIONS

20. The Named Plaintiffs are individuals who are currently, or were within the applicable period of limitations prior to the commencement of this action, employed by Defendant Tyson at its meat processing facilities in Denison, Iowa and Storm Lake, Iowa. This matter is maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(a), Rule 23(b)(1)(A) and (B), and Rule 23(b)(3), on behalf of a Class consisting of: current and former production and support employees of the Tyson meat processing facilities in Denison, Iowa and Storm Lake, Iowa (the "Class").

21. Plaintiffs believe that there are at least 3500 present and former production and support employees in the Class during the relevant Class period of February 6, 2005 to the present.

22. Given the size of the facilities involved and the systematic nature of Defendant Tyson's failure to comply with Iowa statutory law, the members of the Class are so numerous that joinder of all members is impractical.

23. The Named Plaintiffs' claims are typical of the claims of the Class members because they are or were hourly production and support workers who, like the Class members, sustained damages arising out of Defendant Tyson's unlawful compensation system as described in more detail herein.

24. Plaintiffs will fairly and adequately protect the interests of the Class members. Plaintiffs have retained counsel competent and experienced in complex class action wage and hour litigation.

25. Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members. Among the questions of law and fact common to Plaintiffs and the Class are:

a. Whether the work performed by Plaintiffs and the Class is included in the type of work Defendant Tyson employed Plaintiffs and the Class to perform;

b. Whether the work performed by Plaintiffs and the Class is compensable under federal law and/or Iowa state law;

c. Whether Defendant Tyson has engaged in a pattern and/or practice in Iowa of forcing, coercing, deceiving and/or permitting Plaintiffs and the Class to perform work for Defendant Tyson's benefit which was not properly compensated;

d. Whether Defendant Tyson has failed to permit full meal and rest periods as required by Iowa law, other applicable regulations, and/or Defendant Tyson's stated policies;

e. Whether Defendant Tyson has failed to properly compensate Plaintiffs and the Class in connection with interruptions to their meal or rest periods;

f. Whether Defendant Tyson has failed to keep true and accurate time records for all hours worked by its employees as required by Tyson's policies and federal and state law;

g. Whether Defendant Tyson failed to pay Plaintiffs and the Class for all of the work Tyson required them to perform;

h. Whether Defendant Tyson violated the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq. through its practices of not paying employees for all time worked;

i. Whether Defendant Tyson failed to pay employees for time spent walking between work stations after the first compensable work activity and before the last compensable work activity in violation of both the federal Fair Labor Standards Act and the Iowa Wage Payment Collection Law; and

j. The nature and extent of class-wide injury and the measure of damages for the injury.

26. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously,

efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to he encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from the Defendant Tyson's own employment records.

27. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant Tyson.

28. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, the amounts at stake for many of the Class members, while substantial, are not great enough to enable them to maintain separate suits against Tyson.

29. Without a class action, Defendant Tyson will likely retain the benefit of their wrongdoing and will continue an illegal course of action, which will result in further damages to Plaintiffs and the Class Plaintiffs envision no difficulty in the management of this action as a class action.

V. REPRESENTATIVE ACTION ALLEGATIONS

30. Defendant Tyson owns and operates meat processing facilities in Denison, Iowa and Storm Lake, Iowa. The complained of unlawful compensation system at issue in this Complaint has affected Defendant Tyson's present and former production and support employees uniformly at these locations. At all times

relevant to this Complaint, Defendant Tyson has utilized the same compensation system complained about herein.

31. Under Defendant Tyson's wage compensation system, Plaintiffs and Class members who are production employees are paid only during the time that they are present on the actual production assembly line under a system known as "gang time" or "line time." Defendant Tyson, with the exception of the payment to some employees of four minutes per day for "clothes changing time," as a matter of policy and practice, does not pay its employees for all required pre-production line and post-production line activities that are necessary and integral to their overall employment responsibilities, such as: donning and doffing clothing and protective equipment, cleaning and sanitizing that equipment, walking to their lockers and/or production line after already performing compensable activities, and at the end of the work day, walking to the wash stations and then to their lockers and/or supply rooms before the end of compensable time, working on knife maintenance equipment known as "steels" or "mousetraps", and waiting in line to receive required knives, supplies, tools and equipment needed for production line activities. Defendant Tyson also requires its employees to be present at the production line for periods after their "gang time" (i.e. the time when they stop getting paid) but they are not paid for that time.

32. Pursuant to federal regulations and Defendant Tyson's own internal policies and procedures, Plaintiffs and Class members are required to wear uniforms and special personal protective equipment ("PPE") for protection and sanitary reasons. Uniforms include shirts, pants and boots. PPE includes, *inter alia*, plastic aprons, belly guards, wrist guards, mesh sleeves, sheaths,

gloves, mesh gloves, mesh aprons, hardhats, scabbards, hairnets, earplugs, coveralls, eye protection, and other protective equipment and coverings. Most of Defendant Tyson's employees use knives and other sharp instruments in the course of their work and the PPE is designed to protect them from injury. The PPE and other required gear are also designed to protect Tyson's meat products from contamination by food borne diseases.

33. As a consequence of the compensation system utilized by Defendant Tyson, Plaintiffs and Class members are not fully paid at the beginning of each shift for the time it takes to don uniforms, obtain gear, maintain gear, walk from the supply rooms to their lockers and/or from their lockers to sanitation stations and then to production areas, and sanitize the required PPE, walk to production areas and don PPE.

34. At the beginning of each work day, Plaintiffs and Class members are required to report to their lockers to don their uniforms. Production employees must also obtain their PPE, walk to storage areas and obtain knives and other gear, work their steels and/or mousetraps, walk to the sanitation stations and sanitize their gear, walk to the production lines and don the PPE *before* paid time begins. Other than a total of four (4) minutes per day of "clothes changing" time, Plaintiffs are not paid for these work activities.

35. Pursuant to Defendant Tyson's compensation system, employees are not fully compensated for time spent before or after paid time working steels or mousetraps, which is a necessary task for the performance of their job.

36. During their unpaid lunch and other paid or unpaid breaks, Plaintiffs and Class members have to remove their PPE, clean their PPE, and then re-don it

at the end of breaks. These employees are not paid anything or are not fully paid for performing these work activities.

37. After the end of paid time, employees must finish their work on production and other activities, walk to wash stations, wait in line to wash the PPE, knives and other gear, wash their PPE, knives and gear, walk to their lockers, doff their uniforms and PPE and stow the uniforms, PPE, knives and other gear in their lockers.

38. According to Defendant Tyson's compensation system, Plaintiffs and Class Members are not paid during the time after "gang time" (when compensation stops) although they continue to work on final production tasks and then walk to and wait at wash areas, doff PPE, wash PPE and gear (as well as their own bodies), walk to lockers, doff uniforms and stow gear and uniforms.

39. As a result of Defendant Tyson's compensation system, and other practices and policies followed by Tyson, Plaintiffs and Class members are not paid for all of the time that they work presently (other than the four minutes per day "clothes changing" which Tyson purports that it pays) and they have not been paid for all of the time they have worked for several years.

40. Plaintiffs and all Class members are similarly situated individuals who worked at and/or continue to work at Defendant Tyson's meat processing facilities in Denison, Iowa and Storm Lake, Iowa and who were and/or continue to be deprived of their lawful wages under federal and Iowa state law in the same manner.

41. The facts and circumstances relating to Defendant Tyson's compensation system vis-à-vis production time and employment-related activities prior to paid

production time and after paid production time present common questions of law and fact pursuant to Fed.R.Civ.P. 23.

42. Defendant Tyson's failure to pay Plaintiffs and Class members their lawful wages was and is willful. Defendant Tyson knew or should have known that its conduct was unlawful and/or showed reckless disregard for the matter of whether its above-described conduct was prohibited by law. Defendant Tyson does not have written authorization from any Plaintiff or class member to withhold, divert or deduct any portion of Plaintiffs' and class members' wages that arc at issue in this Complaint.

43. Despite its knowledge that time spent by Plaintiffs and Class members, as described above, was compensable time under both state and federal law, Defendant Tyson has refused to fully compensate workers at their Dennison, Iowa and Storm Lake, Iowa facilities for any of this time.

V. CAUSES OF ACTION

COUNT I

VIOLATION OF THE FAIR LABOR STANDARDS ACT

29 U.S.C. § 201 et seq.

All Plaintiffs v. Defendant Tyson

44. Plaintiffs re-allege and incorporate the preceding paragraphs as if fully set forth herein.

45. Pursuant to the Fair Labor Standards Act, specifically 29 U.S.C. § 207, Defendant Tyson was and is obligated to pay employees at a rate equal to one and one-half times their normal hourly rate of pay for all

time spent performing compensable work in excess of 40 hours per week.

46. Pursuant to the Fair Labor Standards Act, specifically 29 U.S.C. § 216(b), Defendant Tyson, because it failed to pay employees the required amount of overtime at the statutory rate, must reimburse the employees not only for the unpaid overtime wages, but also for liquidated damages in an amount equal to the amount of unpaid overtime wages. Plaintiffs assert that the Defendant Tyson's refusal to pay for time worked was willful.

47. Pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), Plaintiffs are entitled to reimbursement of the costs and attorneys' fees expended if they are successful in prosecuting an action for unpaid overtime wages.

WHEREFORE, Plaintiffs pray for the following relief against Defendant Tyson:

A. That this Court permits this action to go forward as a representative action pursuant to 28 U.S.C. § 216(b) and approves notice of this action to all other similarly situated at Tyson's Denison, Iowa and Storm Lake, Iowa facilities.

B. That this Court Order an accounting of lost wages for Plaintiffs;

C. That this Court enjoin Defendant Tyson from continuing to commit unlawful practices related to wages; and

D. That this Court award lost overtime wages, liquidated damages, statutory penalties, interest, costs and attorney's fees.

COUNT II

Violation of The Iowa Wage Payment Collection Law

Iowa Code 91A.1 et seq.

All Class Members v. Defendant Tyson

48. Plaintiffs re-allege and incorporate the preceding paragraphs as if fully set forth herein.

49. Upon information and belief, the Class period for this cause of action is at least February 6, 2005 to the present.

50. Pursuant to the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq., Defendant Tyson is required to pay all wages owed to its employees.

51. Defendant Tyson has intentionally refused to pay all wages due as set forth in the preceding paragraphs of this Complaint to Plaintiffs and class members in violation of the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq.

52. Defendant Tyson is not permitted by state or federal law to withhold or divert any portion of Plaintiffs' and class members' wages that arc at issue in this Complaint.

53. Defendant Tyson does not have written authorization from any Plaintiff or class member to withhold, divert or deduct any portion of Plaintiffs' and class members' wages that are at issue in this Complaint.

54. Pursuant to the Iowa Wage Payment Collection Law, Iowa Code 91A.1 et seq., and specifically Iowa Code 91A.8, employers such as Defendant Tyson who intentionally fail or refuse to pay an employee wages in conformance with the statute shall be liable to the employee for any wages or expenses that were not paid, plus liquidated damages, court costs and usual

and necessary attorneys fees incurred in recovering the unpaid wages or expenses.

55. Defendant Tyson has violated Iowa state law by failing to pay Plaintiffs and class members for all compensable time and by failing to pay Plaintiffs and class members for all work time, including overtime, at the established rate.

WHEREFORE, Plaintiffs and all others similarly situated pray for the following relief against Defendant Tyson:

A. That this Court enter an Order certifying this action as a class action pursuant to Federal Rule of Civil Procedure 23;

B. That this Court Order an accounting of lost wages for Plaintiffs and all others similarly situated;

C. That this Court enjoin Defendant Tyson from continuing to commit unlawful practices related to wages; and

D. That this Court award lost wages, lost overtime wages, interest, costs and attorney's fees.

Respectfully submitted,

/s/ MacDonald Smith
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Attorneys for Plaintiffs

DATED: February 5, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Docket No. C:07-cv-4009-MWB

DALE SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

CLASS ACTION

PLAINTIFFS' MOTION FOR RULE 23 CLASS CERTIFICATION

* * * *

EXHIBIT A

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

CASE NO. C:07-CV-4009-MWB

DALE SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

TAKEN ON BEHALF OF PLAINTIFFS

DEPOSITION OF WILLIAM E. SAGER II, taken at 1:15 p.m. on January 4, 2008, before Matisha M. Stratton, RMR, CCR, and General Notary Public in and for the State of Nebraska, at the law office of Baird Holm, LLP, located at 1700 Farnam Street, 1500 Woodmen Tower, Omaha, Nebraska.

* * * *

[31] A. Okay. If the scheduled start time in this case for A cut is 6 o'clock, then that is when the first hog hits the floor, and that is when work actually commences; therefore, that is when work time starts.

Q. When you say "work time," do you mean paid time?

A. Paid time, yes. And then it stops as soon as the last hog hits the floor.

Q. Have you ever heard the term "gang time" before?

A. Yes.

Q. Is the system you're describing with work commencing when the first hog hits the floor and ending when the last hog hits the floor? Is that—

A. That's gang time.

Q. Gang time?

A. Yes.

* * * *

[47] Q. Do you now what a K code is?

A. Yes.

Q. Is the K—Well, tell me what a K code is.

A. K code is essentially a code that is—that assigns a certain number of minutes to a position based on the equipment required to be worn for that position.

Q. And this K code covers pre- and post-shift activities?

A. Yes.

Q. Is the K code meant to address any time that an employee might lose during an unpaid break removing equipment or walking either to a cafeteria or rest room?

A. Yes.

Q. You think it does?

A. Well, the way I understand a K code—Well, rephrase your question. That would be better.

[48] Q. Well, I think you started to answer it. I mean, the way the K code's been described to me and I believe the way it may even be designated on a pay stub is that it covers pre- and post-shift activities. Have you heard that?

A. Yes.

Q. Or do you have the same understanding I have?

A. Yes.

Q. To me, pre- and post-shift activities mean pre-gang time and post-gang time; would you agree with me on that?

A. Yes.

Q. So my question is: Is it your understanding that the K code time that employees are paid is meant to address any time that an employee might lose or claim they're losing doing any donning activities—or doffing—donning or doffing activities or walking minutes during the 30-minute unpaid break?

MS. BALUS: I'm just going to object. It's outside of the scope of his topics. We've already had a witness talk about it. To the extent you know, you can testify about it.

A. It's my understanding, rightly or [49] wrongly, that the K code is basically set up to cover the time that it takes to don and doff prior to or after the shift, not and including the 30-minute unpaid break, I suppose would be included in that as well.

* * * *

[67] Q. All right. Has there been a change [68] in how Tyson treats the K code in the last two years?

A. Yes.

Q. And when did that change occur at Storm Lake?

A. It was in 2007. I can't recall exactly when that was. I want to say the first half of the year, but I don't recall exactly.

Q. And can you explain to me what the change in the K code was at that time?

A. Sure. Initially, the K code was four minutes additional based on department. So in other words, if you, were in this particular department, regardless of what type of equipment you had, if any, you were paid four minutes. The change that occurred is now it can range anywhere from—if the K code is paid, and it's not in all instances, based—It's based on position. I may be in a position where I don't get a K code based on the fact that I just—I don't have any equipment. Otherwise, it can range anywhere from four to seven minutes. But again, it's not—it's no longer based on department, it's based on position.

Q. So it's your understanding that the [69] maximum that any employee at Storm Lake gets in terms of K code is seven minutes?

A. I believe so.

Q. And when you say "seven minutes," that's a total of seven minutes and not seven minutes in addition to the old four minutes?

A. Correct.

Q. And I believe the way you described it is would it be fair to say that some employees that used to get four minutes under the old K code system, K code, if I didn't say that right, are now not—some of them are not getting anything now?

A. Correct.

* * * *

EXHIBIT "B"

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Case No. C:07-CV-4009-MWB

DALE T. SHARP, et al. on behalf of themselves and all other similarly situated individuals,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

TAKEN ON BEHALF OF PLAINTIFFS

DEPOSITION OF ELIZABETH J. STOUGH, taken at 11:26 a.m. on January 4, 2008, before Matisha M. Stratton, RMR, CCR, and General Notary Public in and for the State of Nebraska, at the law office of Baird Holm, LLP, located at 1700 Farnam Street, 1500 Woodmen Tower, Omaha Nebraska.

* * * *

[3] Q. Can you state your name for the record.

A. Elizabeth Joann Stough.

Q. And by whom are you employed?

A. Tyson.

Q. Do you work at a particular location?

A. The Tyson plant in Storm Lake, Iowa.

MS. BALUS: And I'll just state on the record that we're designating this confidential, subject to the protective order.

Q. What is your job title there?

A. Plant controller.

Q. And can you tell me generally what your job duties are?

A. I manage the accounting department at the plant.

* * * *

[13] Q. Does the kill floor get paid on a gang time system?

A. Yes.

Q. Does the cut floor get paid on a gang time system?

A. Yes.

Q. Does retrim get paid on a gang time system?

A. Yes.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Docket No. 5:07-cv-4009 MWB

DALE T. SHARP, et al., individually, and
on behalf of a class of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF BILL HAUKAP

I, Bill Haukap, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as the Processing Supervisor in the Cut department on the A shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. In addition to the main Cut line, I also supervise the Giblet line, Jowl line, Bone Cannon room, and Utility room, as well as the Hog Pushers and Mule Drivers that work in the Cut department. The main Cut line cuts the carcasses into halves and further trims the carcass. The Giblet line trims the giblets to specification and drops them on a belt to be sent to the Utility room. The Jowl line removes the jowl from the carcass and trims the jowl of skin and hair. The Bone Cannon room sorts out the neck bones with spinal cords in them and boxes the trimmings that come out of the Baader machine. The

Utility room halves the spare ribs and separates the bones from the spare ribs. 1 have held this position since 1995. Before that, I worked as a Cut Supervisor at Tyson's Louisa County, Iowa facility from 1985 through 1995. I began working for Tyson as a Supervisor Trainee in 1985 at the Storm Lake facility.

2. In my position as a Cut Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing and equipment, work schedules and methods of recording time for purposes of compensation for all of the hourly team members that I supervise.

3. There are five team members on the Giblet line: four Giblet Trimmers and one Skirt Meat Trimmer. The Giblet Trimmers use a straight knife and the Skirt Meat Trimmer uses a whizzard knife. The Jowl line, which removes the jowl off the carcass, includes two Jowl Droppers, one Jowl Flipper, one Fanner, and three Jowl Trimmers. The Jowl Dropper and Trimmers use straight knives. Three team members work in the Bone Cannon room: one Sorter that checks for spinal cords, one Boxer that boxes and stacks the finished product, and one Box Maker. No team member in the Bone Cannon room uses a knife. Eleven team members work in the Utility room: one Band Saw Operator, eight Bone-In Short Rib Trimmers, one Inspector, and one Box Maker. Only the Bone-In Short Rib Trimmers use knives. The Cut department also employs three Hog Pushers that move the carcasses from the cooler onto the line, seven Mule Drivers that operate forklifts for the various lines in the Cut department, and two Case Seal Operators that glue shut the boxes from the Cut department, These team members also do not use knives.

4. The clothing and equipment that team members wear differs from department to department and position to position. All team members listed above are required to wear a hard hat, hairnet, beardnet (if necessary), hearing protection, and a frock. Straight knife users must wear a scabbard and steel and whizzard knife users must wear a steel. Since 2007, all team members are required to use a no-maintenance steel that does not need to be sanded. The Giblet Trimmers and Skirt Meat Trimmer must also wear a belly guard, mesh glove and plastic arm guard on their non-knife arm, and polar sleeves on both arms. Trainees in these positions must wear "no cut" Kevlar gloves, but they are optional after the training period has ended. The belly guard, arm guard, Kevlar gloves and mesh gloves are required in order to protect team members from accidentally hurting themselves with the knives that they use. Rubber gloves, cotton gloves, and plastic aprons are optional on the Giblet line. Jowl Droppers must wear a belly guard, plastic apron, a mesh glove on their non-knife hand, a "header" arm guard (which curves above the elbow), and polar sleeves on both arms. Jowl Trimmers must wear a belly guard, a mesh glove or Kevlar glove on their non-knife hand, a plastic arm guard on their non-knife arm, and polar sleeves on both arms. The Fanner must wear a plastic apron and rubber gloves because he uses 180 degree water. Because the Jowl Flipper does not work with a knife, he does not require any additional items. Rubber gloves are not required when touching the product. In the Bone Cannon room, the Sorter must wear rubber gloves. The Boxers in both the Bone Cannon and Utility rooms must wear safety glasses, a plastic apron, and rubber gloves when handling dry ice. The Box Maker must also wear safety glasses, a plastic apron, and rubber gloves when handling dry ice. In the Utility

room, the Band Saw Operator must wear safety glasses. The Bone-In Short Rib Trimmers must wear a belly guard, mesh glove, polar sleeves, and a plastic arm guard. When training, these Trimmers must also wear a Kevlar glove on their non-knife hand. Hog Pushers and Indexers may choose to wear a rain suit and rubber gloves, but these items are optional. Mule Drivers are required to wear an orange safety vest and must don safety glasses when using dry ice. Case Sealers are only required to wear safety glasses and weight belts.

5. All of the clothing that my team members wear is easy to put on and take off and lightweight. I routinely see team members putting on and taking off their clothing while walking to and from the locker area and while talking and focusing on other matters. I estimate that all of the team members I supervise can put on their required items in less than one minute. It takes new employees a little longer until they gain experience at putting their equipment on. At the end of the shift, it takes team members about two to three minutes to remove and wash their items, hang them in their locker, and wipe down the steel if they use one.

6. Team members keep their clothing and equipment, including their knives if they use them, in their locker in the locker rooms. At the end of a shift, team members place their frocks, gloves, polar sleeves, and aprons in a laundry bag that is dropped in a bin in the locker room then laundered by the facility and replaced in each team member's locker before the start of the next shift. Team members also keep their safety glasses, hearing protection, hairnet, beardnet (if needed), and hard hat in their lockers in the main locker room.

7. Before shift, team members retrieve their clothing and equipment from their lockers in the locker room. Team members that use knives must dip their knives, scabbard, steels, arm guards, belly guard, and mesh gloves in a sanitizing solution located in the entrance to the department before reporting to their work station, It takes team members less than 10 seconds to dip all of these items. Other than their frock, hard hat, hairnet/beardnet, and hearing protection, team members do not have to put on their required clothing before entering the production floor. Some team members put on all their clothing before entering the production area, while others put some items on after arriving on the production floor. Many team members put on some items while walking such as their safety glasses and polar sleeves. Team members do not have to wash their hands, clothing, or equipment before starting production work.

8. At the end of shift, knife users take of and rinse their knives, scabbard, steels, arm guards, belly guard, and mesh gloves at one of spray hoses off the production area. This takes approximately two minutes for most team members. Knife users do not have to sanitize their equipment after shift. Team members who do not use knives do not have to perform any washing after shift.

9. Most team members on the Cut floor clock in and out at either the time clock in the cafeteria or at the time clock in the hallway by the second entrance to the Cut floor which is across from the Rendering Department. In my department, most team members are required to work and are paid for the length of production, or gang time. Gang time starts at 6:00 a.m., when the first hog carcass hits the Main Break line. The end of gang time differs daily and is recorded as the time at which the last hog carcass hits the Main Break line.

Each day, I write on that day's time and attendance record the time at which the last carcass hits the line and team members are paid until that time. The Jowl Dropper, Jowl Trimmers, and all Giblet Trimmers must arrive to their work station two minutes before the start of gang time, but they also leave the line two minutes before the end of gang time.

10. Some team members in my department either start work earlier than gang time or stay later than the end of gang time. For example, the paid start times for one Hog Pusher, one Case Seal Operator, and one Utility room team member begins 15 minutes before the start of gang time. They must be in the department at that time. On such occasions, team members are able to put on any required items while on paid time. One or both of the Case Seal Operators will also stay beyond the end of gang time and are paid until they clock out after leaving the department. Accordingly, these team members can remove some of their clothing on paid time. The Bone Cannon Operator's paid start time begins 30 minutes before the start of gang time. All Mule Drivers' paid start time begins 15 minutes before gang time and they are paid 15 minutes beyond the end of gang time. If Mule Drivers finish their post-shift duties in less than 15 minutes they are permitted to doff on paid time.

11. I review team members' time and attendance reports daily. I approve paying those team members performing clean up until they clock out (unless their clock out time far exceeds the end of their clean up duties). These team members remove most of their equipment while on paid time before they perform their clean up duties.

12. Team members in my departments each receive a 15-minute paid break and a 30-minute unpaid meal period each shift. Team members do not have to remove their hard hat, hairnet/beardnet, hearing protection, polar sleeves, or safety glasses to go the cafeteria. They may keep their remaining clothing items and equipment on hooks at their work station or near the wash room. Team members also are not required to wash or sanitize anything either before or after the meal period. Team members may use the restroom as needed with supervisor permission while the line is running. Team members must wash their hands after using the restroom.

13. No team members have indicated to me that they think they are being paid for the actual time they spend changing into and out of their clothes and washing their equipment, and no team members have complained about not being paid for the actual time spent on these activities. I have never told team members that they are or should be paid for the actual time they spend on these activities. I am not aware of any documents provided by the company to team members describing how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 7-28-08

/s/ Bill Haukap
BILL HAUKAP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF RON PETERS

I, Ron Peters, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as a Supervisor in the Shave room on the Kill floor on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately one year. I have been a Supervisor for 12 years and have been employed at the Storm Lake facility since November 1, 1982, always on the Kill floor.

2. The Shave room consists of the stick pen and the trolley room. First, the hog is stunned with an electric circuit by the Stunner. The Shackler then shackles the hog around the foot. There are two Stickers each taking alternate hogs to stick them for the purpose of draining all of the blood out of the animal. The hog then goes through the scald tub, which is controlled by

one Tub Tender, to soften the skin to allow the hair to come off more easily. The hog then goes through a dehairer, which tumbles the animal to force the hair to fall off. The dehairer is run by the same team member who runs the scald tub. The hog then comes to the Gam table. Two Hog Rollers position the hogs so the two Cord Cutters and two Hog Hangers can rehang them by the leg. Once the hogs are rehung, the Indexer pushes them onto the line, where they are sent through a singer, the polisher, and are then shaved by one Side Shaver. Then they go through the predrier, another singer, another polisher, and then pass by three Ham Shavers and another Side Shaver. The hog then passes four Shoulder and Jowl Shavers, one of whom runs a hand skinner. Then the Flusher flushes the hog's mouth out with water and the hog passes through a washer that washes off all of the remaining hair. The Toe Notcher notches the toes, two Bung Gun persons cut around the bung, and one Remove Eyelid team member cuts off the eyelids. All of the positions in this process are paid based on gang time.

3. There are two other team members who are considered part of the Shave Room but are not tied to the chain: one Janitor and one Trolley Room person, who re-oils the trolleys and brings them back to the line.

4. In my position as a Kill floor Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Kill floor at the Storm Lake facility.

5. Many of the positions on the Kill floor are paid based on gang time; however, some are not. For example, the Janitor and the Trolley Room person are not paid based on gang time. The Janitor starts at the same time as the Gutters which is the start of gang time, and stays after the end of gang time to do a wash down between the two shifts, for which he is paid an additional 30 minutes, plus a second 15-minute break. The Janitor can remove his required equipment during this paid time. The Trolley Room team member starts working with the Cut floor at the start of his shift, but ends his shift with the Kill floor, so he gets an additional hour and a half pay beyond gang time, plus a second 15-minute break. The Trolley Room team member can remove his required equipment during this extra paid time. Additionally, on Monday mornings the Trolley Room person starts working before the start of gang time to fill the caustic tank and the oil tank, for which he gets an additional 2 hours and 45 minutes pay, plus a second 15-minute break. The Trolley Room team member can put on his required equipment during this extra paid time. Gang time for the Kill floor, until February 4, 2007, was typically seven hours and 56 minutes. Since February 4, 2007, gang time has typically been seven hours and 55 minutes.

6. One team member who works on the Gam table is paid an additional 45 minutes, plus an additional 15-minute paid break, to stay after the end of shift and help clean up the floor. The Gam can remove his required equipment during this additional paid time. There is also one team member who comes in before the shift to set up in the Trolley Room for which he gets an additional 1 hour and 45 minutes pay, plus a second 15-minute break. The Trolley Room team member can put on his required equipment during this extra paid time.

7. The clothing that team members wear differs from position to position. For example, the Stickers are required to wear one mesh glove, a face shield, a mesh apron, plastic gloves, and an arm guard. They may also choose to wear a rain jacket and plastic sleeves. The Shavers are all required to wear a Kevlar glove, a rubber glove, and an arm-guard on their non-knife hand. They may wear anything they choose on their knife-hand, including going barehanded. They are also required to wear a plastic apron. The Hand Skinner Operator is required to wear a mesh glove on the non-knife hand, a Kevlar glove on the knife hand, rubber gloves, and one mesh sleeve. A plastic apron is optional. The Cord cutters are required to wear a mesh glove and a plastic glove on their non-knife hand and an arm guard. What they wear on their knife-hand is optional, as is a plastic apron. The Stunners are not required to wear anything, but they usually choose to wear cotton gloves. The Shacklers are required to wear a face mask and may choose to wear gloves. The Bung Gun team member is required to wear a mesh glove, plastic gloves, and a plastic apron. The team member in this position sometimes chooses to wear an arm guard. The Indexer is required to wear safety glasses; gloves are optional. The Trolley Room team member is required only to wear safety glasses. The Tub Tender is required to wear plastic gloves, cotton gloves, and a safety harness belt. The Toe Notcher is required to wear safety glasses; gloves and a plastic apron are optional. The Flusher is required to wear a plastic apron and plastic gloves. The Eyelid Trimmer is required to wear mesh gloves, plastic gloves, and safety glasses. The Hog Rollers are required to wear Kevlar gloves on both hands. Everyone on the Kill floor is required to wear the white shirt and pants (or the blue uniform, in the case of the Janitor).

8. The equipment that team members wear varies in weight, is not overly cumbersome, and takes minimal time and little or no concentration to put on or take off. I have routinely seen team members putting on and taking off their equipment while walking to and from the locker area, while talking and focusing on other matters. Some team members are able to put on their required equipment in a minute while some members take a little longer. In my experience, team members get quicker as they gain practice.

9. Team members keep their clothing in their lockers between shifts. They place all of their dirty clothing (sometimes including their mesh gloves) into a laundry bag, which they throw into hampers or drop at the laundry near the locker rooms. The laundry bag has an identification tag on it with the locker number. The dirty laundry is washed, dried, and returned to the locker area where it is hung inside each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is usually hanging inside his locker. They should not have to pick up any items anywhere other than their locker at the start of the shift.

10. Under Tyson's policy, it is my responsibility to assure that team members in my area are paid for all time worked. I am provided with a daily Time & Attendance (T&A) summary for all the team members I supervise. If for any reason team members work beyond their scheduled hours, I will make daily adjustments to their time and attendance as necessary.

11. All team members on the Kill floor receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. Typically, the meal period begins five hours after the start of shift. For example, the Stickers start at 6:58 a.m., so their meal period

should begin at 11:58 a.m. However, before the team members in the stick pen can go to the meal period, both shoots have to be empty and there can be no hogs in the restrainer. Therefore, sometimes the meal period starts a little later if the hogs are not cooperating. Everyone always gets the full 30 minutes from the time they leave the line until the time they need to return to the line.

12. The Janitors take their meal period at a later time than the other Kill floor team members, but they always get a full 30-minute meal period. The Janitors usually remove their required equipment during paid time before the start of their meal period.

13. Team members are not required to wash any of their equipment at the meal period.

14. Team members are no longer required to sand their steels. The process changed sometime at the beginning of the summer in 2007. When team members were required to sand their steels, the frequency with which they performed the activity varied from team member to team member. Sanding a steel should only take a couple of minutes.

15, Tyson provides each team member who uses a knife with two knives, which are already sharpened. Just before the end of the shift, a team member [sic] one knife in a tub in the department to be sharpened by the knife room and keeps one knife in his scabbard in his locker. The newly sharpened knives are then passed out to each team member after the shift has started the next day. Team members are not allowed to go to the knife room before or after a shift or during their meal period.

16. Team members should steel one knife before their first piece of meat arrives at the start of the shift. Each team member differs on bow they steel their knife and how many times they must pass the knife over the steel. When I was an hourly team member, I only needed two swipes on each side of the knife, which took no more than a couple seconds.

17. At the end of the shift, team members must wash their hard hats, scabbards and boots with the wash hoses located on the floor. Some team members spray their mesh, but the mesh should not be too dirty because the mesh glove is covered with a plastic glove and the mesh apron is generally covered with a plastic apron. Some team members also put their mesh items in their laundry bag to be washed. They also put their plastic gloves, Kevlar gloves, and plastic aprons in their laundry bags. Most team members in the Shave room do not get particularly dirty, The Stickers may get bloody, but they can take breaks periodically throughout the shift so they have time to clean off on paid time. Also, the Ham Shavers and Side Shavers sometimes cover for one another so the other can start to clean up on paid time before the shift has ended.

18. It takes 3 to 4 minutes on average for team members in my department to perform their pre- and post-shift clothes changing and washing activities.

19. On or around February 4, 2007, the Storm Lake plant changed the way the team members on the Kill floor were paid for pre- and post-shift activities. Before February 4, 2007, any team member who received additional pay for such activities were given four additional minutes, which time was delineated in the time and attendance system with a K code. Who received the K code depended upon the department in which the team member worked. Since February 4, 2007,

however, team members receive varying amounts of minutes for pre- and post-shift activities, depending upon the job they worked. These additional minutes are also delineated in the time and attendance system under the K code.

20. I have never spoken to any team members about how they would be paid for activities performed before or after shift or during the meal period. I have never provided any team member with any documents related to how they are paid. If a team member complains to me that he has not been paid correctly – for example, if he believes he did not get paid for extra hours or a double shift he worked – I check with payroll to determine whether that team member was paid correctly, and if not, I give them a retro or a manual to make sure they receive the pay they are owed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2-28-2008

/s/ Ron Peters
RON PETERS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF CURT ANDERSEN

I, Curt Andersen, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as the Plant Superintendent for the Cut and Retrim floors (a.k.a. the Cold Side) on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately nine months. Prior to becoming a Superintendent, I was a general Cut Supervisor for about 3 years. Prior to that, I was a general Load Out Supervisor for about three years. I have been employed at Tyson's Storm Lake facility since June 18, 2001.

2. On the Cut floor, the team members break the hogs down into the various primals (*e.g.*, bone-in ham, bone-in loin, spare rib, picnic, butt, and belly). The Cut floor is divided into the following departments: the Main Break line (department 721), the Butt line (department

722), the Belly line (department 723), the Picnic line (department 724), the Bone-In Loin and Bone-in Spare Rib lines (department 725), and department 726, which is a catchall department that includes the Hog Pushers in the cooler, Jowl line, Giblet line, and other various areas.

3. On the Retrim floor, the team members further process the hogs into smaller primals. The Retrim floor is divided into the Boneless Loin line (department 765) and the Boneless Ham line (department 760).

4. In my position as a Superintendent with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Cut and Retrim floors.

5. Many of the positions on the Cut floor are paid based on gang time; however, some are not. For example, the Mule Drivers are not paid based on gang time. They typically start their shift before gang time and end after and are paid for these additional minutes. Floor janitors are also detached from gang time and have staggered start and end times. Gang time for the Cut floor, until February 4, 2007, was typically seven hours and 56 minutes. Since February 4, 2007, gang time has typically been seven hours and 55 minutes.

6. The start and end times for each position are staggered based on when the meat reaches each work station. For example, the Main Break line receives the carcasses from the cooler before the Picnic line, so the team members on the Main Break line start and end production work earlier than those on the Picnic line. Additionally, team members at the beginning of a line usually start and end production work before those at the end of the line. For example, it takes approximately

four minutes for a carcass to run down the entire Picnic line. Therefore, a team member at the beginning of the Picnic line will start and end production work approximately four minutes before a team member at the end of the Picnic line. Each team member does not need to be at their work station until the first product passes their work station.

7. The Retrim floor runs on eight or nine hour shifts rather than seven hours and 56 minutes. When the department runs nine hours, all of the team members are paid an additional 15-minutes (*e.g.*, the line will run until 3:30 p.m., but the team members will be paid until 3:45 p.m.).

8. All of the team members on the Cut floor who use draw knives (*i.e.*, the loin pullers, loin trimmers, and rib pullers) get an additional 10 minutes of paid time every morning so that they may collect the draw knives from the knife room and stone and steel them before the shift starts. Some team members may not take the entire 10 minutes to prepare their knives in which case they can put on their required equipment during paid time. The clothing that team members wear differs from department to department and from position to position. Some team members choose to wear additional clothing that is not required of them, and some team members have a choice in the clothing items they wear. For example, the team members working in Boneless Ham can choose whether they want to wear a mesh glove or a Keviar glove. Cotton gloves are also optional for team members, with a limit of one per hand. However, if a team member chooses to wear a green rubber glove, they must wear a cotton glove over it to avoid cutting their rubber gloves so that pieces of rubber do not end up in the product. No

team member is required to wear green rubber gloves, but most choose to do so to keep their hands warm.

9. The clothing that team members wear varies in weight, is not overly cumbersome, and takes minimal time and little or no concentration to put on or take off. I have routinely seen team members putting on and taking off their clothing while walking to and from the locker area, while talking and focusing on other matters. Team members must be wearing their frocks prior to entering the production floor, but I have seen team members putting on their gloves or sleeves while walking to the production line. Some team members are able to put on their required clothing in a minute while some members take a little longer. In my experience, team members get quicker as they gain practice.

10 The team members gather their clothing and equipment from their lockers every day. Other than team members using draw knives, team members should not have to pick up any items anywhere other than their locker.

11. At the beginning of each shift, team members who use a knife, scabbard, hook, mesh gloves, arm guards, steels, or mouse traps, dip these items in a sanitizing liquid as they enter the production floor. On average, it takes seconds to complete this process. Team members do not have to dip any items at the end of the shift.

12. Unless they drop something on the floor, team members are only required to wash clothing at the end of each shift.

13. Team members keep their clothing in their lockers. They place all of their dirty clothing (sometimes including their mesh) into a laundry bag, which they throw into hampers or drop at the laundry near the

locker rooms. The laundry bag has an identification tag on it usually with the locker number. The dirty laundry is washed, dried, and returned to the locker area where it is hung on each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is usually hanging on his locker.

14. Under Tyson's policy, it is the supervisors' responsibility to assure that team members are paid for all time worked. Each line supervisor is provided with a daily Time & Attendance (T&A) summary for all team members they supervise. If for any reason team members work beyond their scheduled hours, their supervisor will make daily adjustments to their time and attendance as necessary.

15. There are several team members who perform set up activities before the start of shift. For example, some team members come in 15 to 20 minutes early to set up the bagging stations. Some team members come in about 25 minutes early to set up the multivac machine. Other team members come early to set up the knife sterilizers. All of these set up team members are paid additional minutes to perform these activities and they put on their required equipment upon completion of the set up work while still on paid time.

16. All team members on the Cut and Retrim floors receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. On the Cut floor, the meal period occurs at the same time every day, approximately 11:30 a.m. On the Retrim floor, the ham line always takes its meal period at 12:15 p.m. The time at which the team members on the Loin line on the Retrim floor take their meal period varies according to the number of hours the line will be working. If the Retrim floor is scheduled to run for eight hours, the loin line will take the meal period at 11:45 a.m. If the

Retrim floor is scheduled to run for nine hours, the loin line will take the meal period at 12:00 p.m. Team members always receive a full 30 minutes from the time they leave the line until the time they need to return to the line.

17. Team members who plan on going to the cafeteria during the meal period usually remove their frock and their gloves. It takes most team members 5 seconds to remove these items. Their mesh aprons and sleeves do not have to be removed because they are worn under the frock and therefore are not exposed to the meat; however, some team members choose to remove these items during the meal period. Team members usually leave their gloves at their work station and hang the frock and mesh apron on hooks along the walls of the production floor.

18. Team members no longer are required to sand their steels. The process has changed in the last six months or so. When team members were required to sand their steels, the frequency with which they performed the activity varied from team member to team member. Some team members would sand their steels daily, whereas others would only do it once a week.

19. Tyson provides each team member who uses a knife with two knives, which are already sharpened. At the start of the shift, before the first piece of meat reaches their workstation, team members usually have at least one good knife ready to go that they steel by swiping it a few times on each side. In the afternoon, the trainer will come around with a bucket to trade out any knives that need to be sharpened.

20. On or around February 4, 2007, the Storm Lake plant changed the way the team members on the Cut and Retrim floors were paid for pre- and post-shift activities. Before February 4, 2007, any team member who received additional pay for such activities were given four additional minutes, which time was delineated in the time and attendance system with a K code. Who received the K code depended upon the department in which the team member worked. After February 4, 2007, however, team members received between four and seven minutes for pre- and post-shift activities, depending upon the job they worked. These additional minutes are also delineated in the time and attendance system under the K code.

21. The only time I have ever spoken with any team member about whether they were being paid for donning/doffing/washing time was around February 4, 2007, when the new K codes were implemented and only to explain how the number of minutes were assigned. All of the supervisors were told by plant management how to explain to the team members the changes that were taking place with respect to the K code. I have never provided any team member with any documents related to how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2-28-08 /s/ Curt Andersen
CURT ANDERSEN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION — SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,
Plaintiffs,

v.

TYSON FOODS, INC.,
Defendant.

DECLARATION OF RANDY STORY

I, Randy Story, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as a Supervisor on the Kill floor on the second ("B") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I have held this position for approximately 14 years, Prior to this position, I worked as an hourly team member on the Kill floor from August 19, 1984 until I became a Supervisor in 1993.

2. In my position as a Kill floor Supervisor with Tyson, I am familiar with the policies and procedures, required and optional clothing, work schedules, and methods of recording time for purposes of compensation of all the hourly team members on the Kill floor at the Storm Lake facility.

3. Many of the positions on the Kill floor are paid for the length of production, or "gutter" or gang time. Gutter or gang time begins when the first carcass hits

the first position on the line and ends when the last carcass hits the first position on the line.

4. Some team members in my department either start work earlier than gang time or stay later than the end of gang time. For example, there are three to five team members who work pre-shift doing set up activities in the department. Some are paid to come in 30 minutes early and some come in 15 minutes early depending on what they do. There are a similar number who do clean up activities for 15 to 30 minutes after the end of gang time. One team member stays two to two and a half hours after shift to clean knives. All of these individuals are paid for the extra time they work. These Team members often remove their clothing and equipment during paid time.

5. The clothing that team members wear differs from position to position and department to department. The clothing requirements are as follows for those in my departments:

> Stun Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.
>
> Shackle Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, catcher's mask and rubber apron. Rubber and cotton gloves are optional.
>
> Stick Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, extended face mask, steel mesh apron, arm guard, mesh glove on off hand, scabbard, steel, knife and rubber apron.

Tub Tender – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are required.

Rolling Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar gloves, weight belt, and rubber apron. Rubber and cotton gloves are optional.

Cut Gams – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove, arm guard, scabbard, steel, knife and rubber apron. Rubber and cotton gloves are optional.

Hang Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Index Hogs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Shave Sides – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Shave Hams – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (offhand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Shave Shoulders/Jowls – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed

boots, kevlar glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Flush Heads – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Notch toes – Hard hat, whites (pant and shirt) hairnet, hearing protection; steel toed boots, safety glasses and rubber apron. Rubber and cotton gloves are optional.

Drop Bungs – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), and rubber apron. Rubber and cotton gloves are optional.

Trim Eye Lids – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, steel and rubber apron. Rubber and cotton gloves are optional.

Break Necks with Cutter – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Drop Heads – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, kevlar glove (offhand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Head Inspect – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), mesh sleeve, arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Recondition Heads – One wears hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional. The other wears a hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, knife, steel and rubber apron. Rubber and cotton gloves are optional.

Brisket Saw – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Mark H Bones – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Clip H Bones – Hard hat, whites (pant and shirt) hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, aim guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Open Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Insert Hooks – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Gut Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh

apron, kevlar glove (offhand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Inspect Viscera – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, kevlar glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Separate Pluck – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Hang Hearts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron, Cotton gloves are optional.

Recondition Viscera – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Save Spleen – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), rubber gloves, arm guard, scabbard, knife, steel and rubber apron. Cotton gloves are optional.

Save Uteri – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and kevlar gloves (both). Rubber apron, rubber gloves and cotton gloves are optional.

Set Aside Guts – Hard hat, whites (pant and shirt), hairnet, hearing protection and steel toed boots. Rubber gloves, rubber apron and cotton gloves are optional.

Separate Stomachs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, kevlar gloves (both) and rubber apron. Rubber and cotton gloves are optional.

Feed Stomachs – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Save Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber gloves, rubber apron, rains suits, and cotton gloves are optional.

Pipe Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, face shield and rubber apron. Rubber and cotton gloves are optional.

Defat Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, kevlar glove (off hand), and rubber apron. Rubber and cotton gloves are optional.

Pack Rectums – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Pull Black Gut – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, nylon gloves (both), and rubber apron. Rubber gloves, rain suits and cotton gloves are optional.

Separate Black Gut – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, nylon gloves (both), and rubber apron. Rubber gloves, rain suits and cotton gloves are optional.

Large Intestine Pipers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, face shield and rubber apron. Rubber and cotton gloves are optional.

Inspect Re Wash Chits – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both) and rubber apron. Rubber and cotton gloves are optional.

Pack Chits – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Pack Stomach – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both), safety glasses, rubber gloves and rubber apron. Cotton gloves are optional.

Pull Casings – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses or eye shield, mesh glove (off hand), arm guard, belly guard, rubber gloves and rubber apron. Cotton gloves are optional.

Machine Operator – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and rubber apron. Rubber and cotton gloves are optional.

Carcass Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard,

steel, and knife. Rubber apron, rubber gloves and cotton gloves are optional.

Split Saw – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses and rubber apron. Rubber and cotton gloves are optional.

Neck Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (offhand), arm guard, rubber gloves and rubber apron. Cotton gloves are optional.

Cord and Castration Mark – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (offhand), arm guard, scabbard, steel, hook, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Expose Kidneys and Remove Hooks – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, hook, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Final Rail Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), mesh sleeve, arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Retain Butcher – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber gloves and rubber apron. Cotton gloves are optional.

Remove Kidneys – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Pop Tongues – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, knife, belly guard or mesh apron, rubber gloves and rubber apron. Cotton gloves are optional.

Spike Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots and rubber apron. Rubber and cotton gloves are optional.

Round Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, and knife. Rubber gloves, rubber apron and cotton gloves are optional.

Mark Snouts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, and knife. Rubber gloves, rubber apron and cotton gloves are optional.

Chiseler – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, belly guard, scabbard, and chisel. Rubber gloves, rubber apron and cotton gloves are optional.

Feed Snout/Jaw Puller – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots and rubber apron. Rubber and cotton gloves are optional.

Trim Ears – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, belly guard, mesh glove (off hand), arm guard, scabbard, steel, knife, and rubber gloves. Rubber apron and cotton gloves are optional.

Pate Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Jaw Bone Trimmers – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Cheek Heads – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Back Head – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Trim Snouts – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Tongue Trimmer – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard,

steel, knife, belly guard and rubber gloves. Rubber apron and cotton gloves are optional.

VM Chill Room – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, Kevlar gloves (both), and rubber gloves. Rubber apron and cotton gloves are optional.

Box Maker – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses and rubber gloves. Rubber apron and cotton gloves are optional.

Box Offal Product – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, and rubber gloves. Rubber apron and cotton gloves are optional.

Lard Starter – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Lard Puller – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, and nylon gloves. Rubber apron, rubber gloves and cotton gloves are optional.

Lard Scraper – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Spinal Cord Remover – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional

Pull Heart Fat – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed

boots, safety glasses, mesh glove (off hand), arm guard, and rubber gloves. Rubber apron and cotton gloves are optional.

Monitor the Hot Scale – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh apron, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber apron and rubber gloves. Cotton gloves are optional.

Mark Tenders – Hard hat, whites (pant and shirt), hairnet, hearing protection, steel toed boots, mesh glove (off hand), arm guard, scabbard, steel, knife, rubber gloves. Rubber apron and cotton gloves are optional.

Index Hogs – Hard hat, whites (pant and shirt), hairnet, hearing protection, and steel toed boots. Rubber apron, rubber gloves and cotton gloves are optional.

Hog Pushers – Hard hat, whites (pant and shirt), hairnet, hearing protection, rain suit and steel toed boots. Rubber and cotton gloves are optional.

Cooler Janitor – Hard hat, whites (pant and shirt), hairnet, hearing protection, Kevlar gloves, rubber gloves and steel toed boots. Rubber apron, rain suit and cotton gloves are optional.

6. The clothing that team members is not overly cumbersome and takes minimal time and little or no concentration to put on or take off. In my experience, team members get quicker as they gain practice. I have routinely seen team members putting on and taking off their clothing while walking to and from the locker area, while talking and focusing on other matters.

7. Team members keep their clothing in their lockers between shifts. At the end of the shift, team members place their whites, aprons, and gloves into a laundry bag, which they throw into hampers in the locker room or drop at the laundry near the locker rooms. The laundry bag has an identification tag on it with the locker number. The facility washes and dries these items and then returns them to each team member's locker. When the team member arrives at the beginning of the shift, his clean clothing is hanging inside his locker. Any items not laundered by the facility are kept in each team member's locker between shifts. Team members do not have to pick up any items other than at their locker at the start of the shift.

8. Under Tyson's policy, it is my responsibility to assure that team members in my area are paid for all time worked. I am provided with a daily Time & Attendance (T&A) summary for all the team members I supervise. If for any reason team members work beyond their scheduled hours, I will make daily adjustments to their time and attendance as necessary.

9. At the beginning of the shift, anyone who uses a knife, scabbard, steel, mesh glove, and arm guard must dip those items in a sanitizer on the way onto the Kill floor. This takes only seconds. In fact, most usually don't even stop as they walk by and dip their items.

10. All team members on the Kill floor receive a 15-minute paid break and a 30-minute unpaid meal period during each shift. Each person may leave the line for their break and meal period as soon as the last carcass goes past their work station. Everyone always gets the full 30 minutes from the time they leave the line until the time they need to return to the line

11. On a few occasions, I have asked certain team members to work during the regularly scheduled meal period. In those cases, the team members receive their full 30-minute meal period after the others have returned to the line. On some occasions, when the line breaks down, team members may get more than the 30 minutes for the meal period and can take off and put on their clothing on paid time.

12. Team members are no longer required to sand their steels. The process changed sometime at the beginning of the summer in 2007. When team members were required to sand their steels, most did so every day. Team members were permitted to sand their steels at home, in the locker room, or in the cafeteria.

13. Team members are only allowed to steel their knives at their work stations. Team members usually steel their knives before the first piece of meat arrives at the start of the shift during paid time. Steeling a knife takes about two swipes on each side of the knife which takes a couple of seconds.

14. At the end of the shift, team members are required to rinse their knife, scabbard, steel, mesh glove, arm guard, rubber apron, mesh apron, mesh sleeve, boots, hard hat and rubber gloves. It usually takes about 3 minutes to wash their equipment. After washing, team members must dip their knife, scabbard, steel, mesh glove, mesh apron, mesh sleeve and arm guard. Dipping these items takes about a second.

15. I have never spoken to any team member about how they would be paid for activities performed before or after shift or during the meal period. I have never

provided any team member with any documents related to how they are paid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/27/08

/s/ Randy Story
RANDY STORY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-4009 MWB

DALE T. SHARP, et al.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

DECLARATION OF LIVORIO CARRILLO

I, Livorio Carrillo, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I am employed as an hourly team member on Line 721, the Loin line, on the first ("A") shift at the Storm Lake, Iowa facility of Tyson Foods, Inc. I work Pulling Loins, a job I have worked for 14 years. However, I often work in other positions to cover for other team members as needed. When I first started at the Storm Lake, Iowa facility, in July 1993, I worked pushing hogs and then trimming loins before moving to my current position.

2. In my position Pulling Loins, I am required to wear a hard hat, a hairnet, ear protection, a beardnet, a smock, a plastic apron, a belly guard, rubber boots, polar gloves (on both hands), rubber gloves (on both

hands), a polar sleeve, a white handled steel, a sharpening stone and a file for the steel. I also wear an optional back brace. It is not difficult to put on or remove my items of clothing.

3. I am paid to come in 10 minutes before the line starts running every day to sharpen my pull, or "draw," knives. During these ten minutes, I go to the knife room to pick up two knives and work the knives with a steel.

4. I receive a 30-minute unpaid meal period each shift. The exact time of our meal period varies depending on when the last piece of meat passes my work station, but it usually begins between 11:30 a.m. and 12:00 p.m. I do not have to wash or dip any equipment or clothing before my meal period. I simply remove both sets of gloves, the apron, belly guard, and frock and I leave them on the hooks by my work station which takes less than a minute. I do not have to be back at my work station until the first piece passes my work station which is always at least 30 minutes after the start of my meal period.

5. Production on my line typically ends around 2:30 p.m. but I am paid to work an extra 30 minutes to do cleanup activities in the department. At the end of my shift, I wash my steel, belly guard, apron, and boots. I also dip my steel, belly guard, and knifes. I then throw all items of clothing into the laundry bag and put the bag in a hamper right in the locker room. Since I work 30 minutes extra, I remove my clothes, wash, and dip on paid time.

6. I was never told by anyone that I would be paid for the actual time I spend changing into and out of my clothes and walking to my work station. I have never had a conversation with anyone from Tyson management about such time. I have never seen any documents indicating that I would be paid more than I already am for such time.

7. I have only had a problem with my pay on a couple of occasions, when a supervisor changed jobs for example, that there has been confusion over whether I should get my 10 minutes. I usually explain it to them and then it gets fixed. Other than that, I have never had any problems. Tyson always pays me for my extra clean up time.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 2-28-08 /s/ Livorio Carrillo
LIVORIO CARRILLO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/07/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,
Plaintiffs,

v.

TYSON FOODS, INC.
Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant Tyson Foods, Inc. submits the following proposed jury instructions.

* * * *

FINAL INSTRUCTION NO. 10

Burden for Collective Action; Class Action;
Representative Evidence (Defendant)

Plaintiffs have brought their federal claim as a collective action. That means that the Court has allowed other employees at Tyson Foods' hog-processing plant in Storm Lake, Iowa to pursue their claims collectively with the six named plaintiffs. These other employees are entitled to prevail on their Fair Labor Standards Act claims only if they establish that they are all similarly situated to the named plaintiffs and each other.

To show that all of the employees that plaintiffs seek to represent in this lawsuit are similarly situated, plaintiffs must establish that all of the employees joined in this suit were affected by a common, unlawful decision, policy, or plan. It is not enough that only some of the employees joined in this suit were affected by the decision, policy, or plan.

Both parties have presented various types of evidence: live or deposition testimony of hourly employees, supervisors, expert witnesses, and others; video clips; and documents. Not all affected employees need testify for plaintiffs to prove that they were similarly affected by a common decision, policy, or plan that violated the Fair Labor Standards Act. Rather, if some employees testify about the activities they allegedly performed or the amount of unpaid overtime they allegedly worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This is called "representative testimony."

There is no bright-line as to the percentage of employees that must testify for their testimony to be representative. Rather, the weight to be accorded the evidence is a function not of its quantity, but of its quality. In evaluating the testimony, you may consider whether the witnesses who testified worked in similar positions and similar departments as the non-testifying employees; whether they wore similar sanitary and protective items; whether the testifying employees performed donning and doffing activities similarly to non-testifying employees; whether the witnesses who testified had the opportunity or ability to observe non-testifying employees; and whether there was evidence presented that either was consistent with or was inconsistent with the testimony of the testifying witnesses.

Although the elements of plaintiffs' Iowa claims are the same as those under the federal law, the standard that plaintiffs must meet to bring their Iowa claims on behalf of other current and former hourly employees at the Storm Lake facility is higher. To prove their Iowa claims, the six named plaintiffs must demonstrate the elements of their claims for each member of the class. That is, the plaintiffs must present common evidence that supports class-wide liability and does not vary from individual to individual. If you find that proof of plaintiffs' claims against Tyson Foods does not necessarily prove the claims of all the other hourly employees, then plaintiffs have not met their burden for those employees.

Authority

29 U.S.C. § 216(b) (FLSA collective action may be maintained by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 621 (8th Cir. 1991) (in actions where the evidence demonstrates that employees are subject to differing work situations that make pattern evidence unpersuasive, each plaintiff must meet his burden individually); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 952 (11th Cir. 2007) (to maintain a collective action under the FLSA "plaintiffs must demonstrate that the are 'similarly situated'"); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471-73 (11th Cir. 1982); *In re Food Lion*, 861 F Supp. 1263, 1272-74 (E.D.N.C. 1994); *Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116, [sic] (4th Cir. 1985) (plaintiffs can present representative evidence to support an award of back pay to non-testifying employees); *Brock v. Norman's*

Country Market, Inc., 835 F.2d 823, 828 (11th Cir. 1988) (same); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793-94 (1st Cir. 1991); *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F. 2d 1317, 1331 (5th Cir. 1985) ("Testimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not."); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (plaintiffs' evidence was sufficient since at least one employee from each category testified or was deposed); *Saleen v. Waste Mgmt., Inc.*, Civ. No. 08-4959 (PJS/JJK), 2009 WL 1664451, at *6 (D. Minn. June 15, 2009) (at first-stage conditional certification, "the proper inquiry is whether Plaintiffs have shown a colorable basis that there is a single decision, policy, or plan affecting all of the individual employees"); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 570-88 (E.D. La. 2008) (decertifying FLSA collective action after trial because evidence showed that employees were not similarly situated); *Resendiz-Ramirez v. P & H Forestry, LLC*, 515 F. Supp. 2d 937, 941 (W. D. Ark. 2007) (certification under the FLSA "typically requires a showing that the plaintiffs and potential class members were victims of a common decision, policy, or plan of the employer that affected all class members in a similar fashion."); *Chao v. Pac. Stucco, Inc.*, 2006 WL 2432862, at *3 (D. Nev. Aug. 21, 2006) ("A determination of whether the representative testimony adequately represents the class depends on the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony.").

See Elizabeth M. v. Montenez, 458 F.3d 779, 786-87 (8th Cir. 2006) (discussing what Rule 23 class representative must eventually prove; "The presence of a common legal theory does not establish typicality when

proof of a violation requires individualized inquiry."); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."); *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191-93 (11th Cir. 2009) (time records showing gap time between punches and productive work not sufficient to establish common proof in Rule 23 class action where employee testimony varied regarding the non-work-related activities that took place during the gap periods and the various personal reasons that employees came in early and stayed late); *Blyden v. Mancusi*, 186 F.3d 252, 266-67 (2d Cir. 1999) (verdict sheet must require findings sufficient to support class-wide liability); *Cimino v. Raymark Indus.*, 151 F.3d 297, 312 (5th Cir. 1998) (class action device does not "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law."); *In re Welding Fume Products Liability Litig.*, 245 F.R.D. 279, 311 (N.D. Ohio 2007) (finder of fact must be able to "determine, on a class-wide basis, whether the defendant's conduct" was a violation toward every plaintiff); *see also Zapata v. IBP, Inc.*, 167 F.R.D. 147, 160 (D. Kan. 1996) (finding plaintiffs could not proceed as a class where they failed to identify an unlawful company-wide practice or policy). *See generally Vaughan v. Mortgage Source LLC*, No. CV 08-4737, 2010 WL 1528521, at *4 (E.D. N.Y. Apr. 14, 2010) ("Courts have repeatedly stated that Section 216(b)'s 'similarly situated' requirement is considerably less stringent than the requirements for class certification under Rule 23."); *Wacker v. Personal*

Touch Home Care, Inc., No. 4:08CV93, 2008 WL 4838146, at *2-3 (E.D. Mo. Nov. 6, 2008) (accord); *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550, 553 (E.D. Wis. 1994) ("similarly situated requirement of Section 216(b) is considerably less stringent than" requirements of Rule 23).

* * * *

FINAL INSTRUCTION NO. 17

De Minimis Defense (Defendant)

Tyson Foods is required to pay for all compensable work unless it proves by a preponderance of the evidence that the amount of work was what is referred to as "*de minimis*."

The following factors are considered in determining whether work activities are "*de minimis*":

1. The practical administrative difficulty of recording the uncompensated time;

2. For each employee separately, the aggregate amount of *uncompensated* time spent each day on the activities;

3. The regularity of the uncompensated work.

This defense applies only where there are uncertain and indefinite periods of time involved that are of short duration and where the failure to count such time is due to considerations justified by industrial realities. There is no precise amount of time that may be denied compensation as *de minimis*. No rigid rule can be applied with mathematical certainty. Rather, common sense must be applied to the facts of this case.

In applying the factors I described, you may wish to consider the following questions:

1. What is the reasonable, not the actual, amount of daily time spent by an employee on the activities?

2. How much of that reasonable time was not compensated by Tyson Foods?

3. Was it administratively feasible to precisely record that time for payroll purposes?

Not all of the factors need to be proven for you to find that the activities were *de minimis*. Rather, if considering all of the factors on balance results in a finding that the time spent on donning, doffing, and washing activities is *de minimis*, employees will not be compensated for these activities beyond what you find they may already have been paid. In considering whether the total amount of time for which compensation is sought is *de minimis*, you should consider only the uncompensated time.

You should consider only the time that is spent on work. In other words, if an activity is not work, that time should be excluded from your *de minimis* analysis. For example, time spent donning and doffing items that are optional or primarily benefit the employee or socializing that may occur after donning, but before the start of production work, or after the end of production work, but before doffing, should be excluded.

In addition, you have heard testimony about employees being paid for non-production time, which they could use for their donning, doffing, and washing activities. In considering whether the total amount of unpaid time is *de minimis*, it is appropriate for you to include this paid non-production time in your analysis.

Authority

29 C.F.R. §785.47; 29 C.F.R. §785.48(a) ("Minor differences between the clock records and actual hours

worked cannot ordinarily be avoided, . ."); *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 692 (1946) ("compensable working time was limited to the minimum time necessarily spent . "); *Lindow v. United States*, 738 F.2d 1057, 1062-64 (9th Cir. 1984); *Singh v. City of New York*, 524 F.3d 361, 370-72 (2d Cir. 2008); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir. 1994); *Pressley v. Sanderson Farms*, No. Civ. A H-00-420, 2001 WL 850017, at *3 (S.D. Tex. Apr. 23, 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563-64 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Musticchi v. City of Little Rock, Arkansas*, __F. Supp. 2d __, 2010 WL 3327998 at **9-11 (W.D. Ark. Aug. 24, 2010) (*de minimis* defense considers "the minimum time it takes to complete the task") (quoting *Anderson v. Mt. Clemens Pottery*); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1317-21 (N.D. Ala. 2008); *Kassa v. Kerry, Inc.*, 487 F Supp. 2d 1063, 1067 n.1 (D. Minn. 2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903-904 (9th Cir. 2003), *aff'd on other grounds*, 126 S. Ct. 514, 525 (2005); *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 518-20 (E.D. Tex. 2005); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, at *11 (E.D. Wash. Sept 14, 2001) ("compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity"; finding "reasonable time" to don and doff non-unique clothing such as "hard hats, earplugs, frocks, safety glasses, a hairnet, and boots" to be *de minimis*); *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716, 724, 736 (D. Neb. 1948) (applying *de minimis* doctrine based on the "time reasonably" required for the pre- and post-shift clothes changing activities); *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001) (in determining

application of the *de minimis* doctrine, the court considered the reasonable amount of time spent by the plaintiffs in performing the activities in question); *Saunders v. John Morrell & Co.*, 1991 WL 529542, at *5 ("These factors are not mechanical or rigid, but are flexible . . "); *Amos v. United States*, 28 Wage & Hour Cas. (BNA) 569, 575 (Ct. Cl. 1987) (plaintiffs entitled to payment only for the "amount of time reasonably required" to perform the activities in question); *McIntyre v. Joseph E. Seagram & Sons*, 72 F. Supp. 366, 372 (W.D. Ky. 1947) ("The evidence in this case conclusively shows that complainant, acting with reasonable dispatch, could, after punching in at the time clock, go to his locker, exchange a soiled for a clean uniform, change his clothing and report to his foreman ready for productive work in from 10 to 20 minutes. Such time is within the *de minimis* rule.").

* * * *

FINAL INSTRUCTION NO. 23

Damages (Defendant) [Provisional: Defendant Offers The Bracketed Portion Of This Instruction Only If The Court Denies Its Motion For Summary Judgment On The Meal-Period Claim]

If you find that plaintiffs have proven their claims, and that Tyson Foods has failed to prove that the employees' activities were *de minimis*, then you must turn to the question of damages.

Plaintiffs have the burden of proving damages and will have carried their burden only if they prove that the employees have in fact performed work for which they were not paid and produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference.

The burden then shifts to Tyson Foods to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from the plaintiffs' evidence. If Tyson Foods fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.

If you find that the activities in issue are compensable, any employee who already has received full compensation for all those activities is not entitled to recover any damages. If you find that such compensation was not sufficient to cover *all* of the activities at issue, all uncompensated work should be taken into account in calculating damages.

An employee's "regular rate" during a particular week is the basis for calculating any overtime pay due for that week. The "regular rate" for a week is determined by dividing the first 40 hours worked into the total wages paid for those 40 hours. The overtime rate, then, would be one and one-half of that rate and would be owed for each hour in excess of 40 hours worked during the work week.

Authority

Anderson v. Mt. Clemens Pottery Co., 338 U.S. 680, 687 (1946); 29 U.S.C. §§ 207(a)(1), 207(e), 254(b); 29 C.F.R. §§ 778.110, 790.5(a), 790.7(a); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, 37 (2005) (an employer must generally compensate employees for the time between their first and last principal activity, but affirming lower courts' awards limiting the damages to the time reasonably spent on the donning and doffing-related activities).

* * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/07/10]

Docket No. 5:07-CV-04009 JAJ

PEG BOUAPHAKEO, et al. individually and on behalf of a class of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

JURY VERDICT FORM

I. PLAINTIFFS' CLAIMS

1. *Question 1*. Have the plaintiffs proved by a preponderance of representative evidence for every class member that donning, doffing and rinsing of standard safety and sanitary items are "work"?

Federal Plaintiffs	Yes___	No___
Iowa Plaintiffs	Yes___	No___

If your answer to Question 1 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 2 below.

Question 2. Have the plaintiffs proved by a preponderance of representative evidence for every class member that donning, doffing and rinsing of standard safety and sanitary items are "integral *and* indispensable" to their production jobs?

Federal Plaintiffs Yes___ No___

Iowa Plaintiffs Yes___ No___

If your answer to Question 2 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 3 below.

Question 3. Have the plaintiffs proved by a preponderance of representative evidence for every class member that they have not received full compensation for their work activities in weeks in which they worked 40 or more hours?

Federal Plaintiffs Yes___ No___

Iowa Plaintiffs Yes___ No___

If your answer to this Question 3 is "no", answer no more questions. Sign and date this verdict form because you have completed your deliberations in this case. If you answered "yes", then answer Question 4 below.

II. TYSON'S DEFENSE

Question 4(a). Has Tyson Foods proved by a preponderance of the evidence that any uncompensated "work" time in the *Kill* area is *de minimis*?

Yes___ No___

A "yes" answer means that no further compensation is owed to plaintiffs who worked in these departments. A "no" answer means that further compensation is owed to plaintiffs who worked in these departments.

Question 4(b). Has Tyson Foods proved by a preponderance of the evidence that any uncompensated "work" time in the *Cut/Retrim (also known as Fabrication)* area is *de minimis*?

YES___ NO___

A "yes" answer means that no further compensation is owed to plaintiffs who worked in these departments. A "no" answer means that further compensation is owed to plaintiffs who worked in these departments.

III. DAMAGES

Answer the following question *only* if you answered "no" to either part of Question 4.

Question 5. How much additional compensation does Tyson Foods owe? $_____

Signature of Foreperson:_____

DATE: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/13/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

DEFENDANT'S AMENDED AND CORRECTED INSTRUCTION NO. 11

COMES NOW Defendant Tyson Foods, Inc. and files the attached amended and corrected version of its Instruction No. 11 previously submitted.

* * * *

FINAL INSTRUCTION NO. 11

(Amended and Corrected)

Work

Federal law requires Tyson Foods to pay employees for all hours worked. You must decide whether Plaintiffs have proved that putting on, taking off and washing items is "work." Work is any (1) physical or mental exertion, whether burdensome or not, (2) controlled or required by the employer and (3) pursued necessarily and primarily for the benefit of the employer and its business. Exertion is not required in circumstances where the employer requires the employee to report to the workplace at a certain time and the employee waits to be engaged.

Authority

IBP, Inc. v. Alvarez, 546 U.S. 21, 25-28 (2005); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1361 (8th Cir. 1993); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994); *Smith v. Aztec Well Serv. Co.*, 462 F.3d 1274 (10th Cir. 2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

[Filed: 10/14/10]

No. 5:07-cv-04009 JAJ

PEG BOUAPHAKEO et al., individually and
on Behalf Of Themselves and
All Other Similarly Situated Individuals,

Plaintiffs,

v.

TYSON FOODS, INC.

Defendant.

DEFENDANT'S AMENDED AND CORRECTED INSTRUCTION NO. 12

COMES NOW Defendant Tyson Foods, Inc. and files the attached amended and corrected version of its Instruction No. 12 previously submitted.

* * * *

AMENDED AND CORRECTED FINAL INSTRUCTION NO. 12

Preliminary vs. Principal Activity (Defendant)

There is an exception to the general rule that employers must pay for all work. Employers do not have to pay an employee for activities that are preliminary—that is, that occur before the employee performs his or her first principal activity of the day, or for activities that are postliminary—that is, that occur after the employee performs his or her last principal activity of the day.

In certain circumstances, activities that occur before or after a scheduled shift may be compensable provided they are both integral *and* indispensable to the production work for which the employee is employed to perform.

Plaintiffs must prove by a preponderance of the evidence that any pre-shift or post-shift activity that they claim is a first or last principal activity is integral and indispensable to the production work for which the employee is employed. Whether an activity is integral and indispensable depends on the existence of three factors: (1) the activity must be required by the employer, (2) the activity must primarily benefit the employer, and (3) the activity must be essential to complete the work the employee is required to perform. Plaintiffs must prove the existence of all three factors.

The fact that an activity is necessary for the employee to engage in his or her principal activity—as opposed to essential to completing the principal activity—does not make the activity integral. When "performed under the conditions normally present," changing clothes and washing up are not an integral and indispensable part of the employee's principal activities. To decide

whether Tyson Foods primarily benefits from an activity, it is not enough for Tyson Foods to have received some benefit from the activity or that Tyson Foods and the employee equally benefit. Rather, Tyson Foods must receive the primary benefit of an employee's donning, doffing, and washing.

Authority

29 U.S.C. § 254(a); 29 C.F.R. § 790.7; *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50-51 (8th Cir. 1984) (examples of noncompensable activities specifically enumerated in the Senate report on the Portal Act as being outside the workday include changing clothes, washing up and showering) (citing *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 398 (5th Cir. 1976)); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 23, 39 (2005) ("the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are integral and indispensable "); *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1342-45 (11th Cir. 2007); *In re Tyson Foods, Inc.*, 694 F. Supp. 2d 1358, 1363-66 (M.D. Ga. 2010); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1311-15 (N.D. Ala. 2008); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592-94 (2d Cir. 2007); *Pirant v. United States Postal Serv.*, 542 F.3d 202, 208-209 (7th Cir. 2008); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994); *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 399-400 (5th Cir. 1976); *Musticchi v. City of Little Rock, Arkansas*, __ F. Supp. 2d __, 2010 WL 3327998 at **7-8 (W.D. Ark. Aug. 24, 2010) (following Gorman) (while cleaning equipment may be necessary or indispensable to the job, employees could successfully do their jobs without cleaning, and thus these activities were not integral); *Anderson v. Pilgrim's Pride*

Corp., 147 F. Supp. 2d 556, 562-63 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms*, No. Civ. A H-00-420, 2001 WL 850017, at *2-3 (S.D. Tex. Apr. 23, 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002); *Reich v. Oscar Mayer Foods Corp.*, No. 4:93cv204, 1995 WL 1765643, at *2 (E.D. Tex. Mar. 2, 1995); *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716, 731-32 (D. Neb. 1948).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION - SIOUX CITY

[Filed: 10/14/10]

Civil No. 5:07-cv-04009-JAJ-TJS

PEG BOUAPHAKEO, et al.,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

ORDER FOR FINAL PRETRIAL CONFERENCE

* * * *

V. LEGAL CONTENTIONS

A. Plaintiff's Legal Contentions:

1. To prevail, plaintiffs are not required to establish that each of the contested activities are "work" or "integral and indispensable" to a principal activity because all activities occurring after the first such integral and indispensable activity are automatically compensable as part of the Department of Labor's "continuous workday" rule that the Supreme Court recognized in *IBP v. Alvarez*, 546 U.S. 21, 29 n.3 (2005) ("'Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked.'", quoting 29 C.F.R. § 790,6(a)); *see also id.* at 38 (holding that

"during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is . covered by the FLSA.").

2. For knife-wielding employees, plaintiffs contend that the first compensable act that begins the continuous workday is the act of obtaining and donning one or more items of the company-issued gear and equipment that has already been held to be compensable, and that the Storm Lake plant was permanently enjoined from treating as non-compensable in *Reich, supra*. All other activities at issue in this case for knife-wielding employees follow such compensable knife-related activities and are therefore automatically compensable as part of the Department of Labor's "continuous workday" rule set forth above. Plaintiffs contend the same analysis applied to non-knife wielding plaintiffs based on their obtaining and donning one or more items of their sanitary gear and equipment at the start of their shift which commences the continuous work day for which compensation must be paid for all the remaining activities at issue in this case.

3. Plaintiffs contend that defendant Tyson is collaterally estoppel from denying the compensability of the knife-related gear and activities held to be compensable, and enjoined to be compensated at the Storm Lake Plant in *Reich v. IBP*, 820 F.Supp. 1315 (D. Kan. 1993), *affirmed* 38 F.2d 1123 (10th Cir. 1994); *remedies on remand*, 1996 WL 137817 (D. Kan. 1996), *affirmed sub. nom., Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997).

4. Plaintiffs request that the calculation of individual amounts of backpay for each plaintiff and class member be bifurcated so that the jury trial will be limited to the issues of liability, the number of minutes it

takes to perform the contested activities, and the number of such minutes that have not been paid. With those determinations, the individual backpay amount for each class member will be a ministerial matter based on arithmetic and the defendant's computerized time and payroll records.

5. The defendant has notified plaintiffs that it does not contest whether the plaintiffs have satisfied the wilfulness standard for extending the limitations period to three years for all plaintiffs, opt-in plaintiffs and class members.

6. The defendant has withdrawn any contention or defense of good faith.

7. The trial of this case involves no issue related to class or collective certification or decertification. Those issues have been resolved in this Court's class certification decision reported as *Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870 (N.D. Iowa 2008). Class and collective certification and decertification would be procedural issues for the Court, not a jury.

8. Plaintiffs' other legal contentions are set forth in the Section IV.A above as part of plaintiffs' Factual Issues.

B. Defendant's Legal Contentions:

1. Donning, doffing, and washing of standard sanitary and protective items (e.g., frock, whites, hard hat, hair net, ear plugs, boots, safety glasses, plastic apron, plastic sleeves, cotton gloves, plastic gloves) are not "work." Such activities do not require physical or mental exertion. Some of the items at issue are not required in certain positions and are worn only at the employee's choice for their comfort or convenience. Some items can be worn from and to home. The safety

5. In addition, many of the Plaintiffs have already been paid for some or all of the activities through the payment of "K code" time that was specifically intended to compensate for the activities at issue.

6. Even if Tyson were liable to some or all of the named Plaintiffs, there is no class-wide liability, either to the FLSA opt-ins or to the state-law Plaintiffs. The Plaintiffs are not similarly situated, in that there was no common decision, policy or plan that violated the FLSA. In addition, each Plaintiff presents individualized circumstances. There is no common evidence that supports class-wide liability and does not vary from individual to individual. The Court's prior conditional certifications of the two classes does not bind the jury, and the plaintiffs are required to prove at trial the elements of their claims for each class member to recover on a class-wide basis.

7. Defendant opposes Plaintiffs' requested bifurcation of damages from the liability phase of the trial. Plaintiffs first raised this issue on October 14, 2010, after both sides had exchanged proposed jury instructions on the damages issue and had listed multiple trial exhibits relating to damages. Bifurcation would unduly prejudice Defendant because one of its defenses is that it has already paid for some or all of the activities at issue. Bifurcation at this late date should also be denied as a waste of resources.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

Docket No. 5:07-CV-04009 JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ
JAVIER FRAYRE, HERIBENTO RENTERIA,
JESUS A. MONTES, and JOSE A. GARCIA,
individually behalf of a class of
others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

PARTIES' JOINT STIPULATION OF FACTS

I. STIPULATED FACTS: The parties agree that the following facts are true and undisputed:

1. Tyson Fresh Meats, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc.

2. Tyson Fresh Meats, Inc. owns and operates a pork-processing facility in Storm Lake, Iowa, where hogs are slaughtered and processed.

3. Tyson Foods, Inc. is a Delaware corporation, with its principal place of business in Arkansas.

4. Tyson Fresh Meats, Inc. is a Delaware corporation, with its principal place of business in South Dakota.

5. Tyson Foods has been engaged in interstate commerce or in the production of goods for interstate commerce throughout the relevant time period.

6. The "production" areas of the Storm Lake plant include Kill, Cut, and Re-trim.

7. This case was brought by six named Plaintiffs: Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus Montes, and Jose Garcia.

8. The six named Plaintiffs are pursuing this case as a class action. The named plaintiffs are seeking to make a claim on behalf of all of the employees under Iowa law. In addition, some of the employees in this case are making a claim under a federal law known as the Fair Labor Standards Act.

9. The Iowa plaintiffs are those current and former hourly production employees who worked in the Kill, Cut or Retrim areas of the Storm Lake plant at some point between February 7, 2005 and July 3, 2008, although they may have continued to work after that date as well. This is known as the "state class" or "Iowa class." There are 3,344 employees in this class.

10. The federal plaintiffs are those current and former hourly, production employees who worked in the Kill, Cut or Retrim areas of the Storm Lake facility at some point after March 31, 2004, and who filed consent-to-join forms with the Court on or after March 31, 2007. This is known as the "federal class" or "the "FLSA class" There are 444 employees in this class, including the six named Plaintiffs.

11. The main production departments at the Storm Lake facility are the kill department, the cut department, and the "re-trim" department. These three departments contain approximately 1,300 hourly workers.

Each of these departments typically run two shifts daily.

12. Approximately 1,300 hourly workers are employed in the Kill, Cut, and Re-trim production areas at the Storm Lake facility.

13. The Kill, Cut, and Re-trim production areas at the Storm Lake facility operate on both an A shift and B shift.

14. Both shifts of the kill department total approximately 380-400 hourly workers. Both shifts of the cut department total approximately 440-460 hourly workers. Both shifts of the Re-trim department total approximately 440-450 hourly workers.

15. The kill department slaughters the hog, removes the internal organs, sends the head, feet and internal organs to the evisceration room, and sends the carcass to the cooler for cold storage. The carcass is the two "sides" of the hog which contain edible meat. The cut department breaks the chilled carcass down into its "primal pieces" which is smaller parts such as front shoulder, loins, bellies, hind quarters and hams. Some items are packed for shipment to customers or other Tyson plants in the cut department and others are sent to the Re-trim department for further processing. The retrim or conversion department involves the further processing of hams and loins and additional trimming of those products.

16. Employees using required [sic] to don, doff and wear or use some knives on the job are combination of a plastic belly guard, mesh apron, mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining knives, and knife scabbards ("knife-related" items, equipment or activities hereafter).

17. Employees are required to stow such knife-related items and equipment in their lockers at the end of their shift except for items that require or need laundering or items that require or need replacement

18. "Sanitary items" include such items as the frock, hairnet, beard net, cotton and rubber gloves, rubber apron and rubber sleeves.

19. Hourly production workers are required to wear a hard hat, a hairnet, a beard net (if they have facial hair), and earplugs or ear muffs while on the production floor. Additional items required to be worn are listed on a form for each particular position known as a Job Safety Analysis, or JSA.

20. Non-knife wielding employees may also don and doff rubber gloves, cotton gloves and rubber or plastic aprons.

21. Workers in the Cut and Re-trim processing areas are required to wear a fabric frock over their street clothes while on the production floor.

22. Workers in the Kill area wear a fabric white shirt and pants ("whites") provided by Tyson, except that workers may choose to wear their own light-colored shirt and pants instead of the Tyson-issued.

23. Production employees go to their lockers at the start of their shift to obtain their individual supply bag in which Tyson has put their sanitary items and equipment that requires laundering between shifts, such as the company-issued frock, cotton gloves, Polar gloves, and Polar sleeves.

24. Knife-wielding employees must also go to their lockers at the start of their shift to retrieve their knife-related items and equipment.

25. The parties agree that donning, doffing and rinsing the following items is compensable: mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, plexiglass arm guard, mesh sleeve, and membrane skinner gloves.

26. There are time clocks located at the entrances of the kill, cut and re-trim departments.

27. At all relevant times, Tyson has had a policy and practice requiring workers to swipe an identification card each day, before and after their shift. The swipe generally is used to register attendance.

28. The production time for which an employee is paid may be less than the time between the swipe in and swipe out, but the swipe in/swipe out does not measure production time.

29. Although the time clocks record the time that hourly workers punch the clock to the minute, Tyson does not use such recorded time to determine an employee's compensable hours or pay. The time clocks are generally used to record attendance.

30. Workers are required to be at their work stations on the production floor at their scheduled start time.

31. Employees are not supposed to perform work on the production line without wearing all of the required sanitary and protective items and equipment for their position. They are disciplined if they are not wearing their required sanitary and protective items and equipment.

32. Employees are also required to remove some of their sanitary and protective items and equipment, including their frock (if applicable) before entering the rest room. Employees are only permitted to wear their

white shirt and pants, hair net, hard hat, earplugs, and boots into the restroom (whether personally provided or company-provided).

33. From 1998 until February 4, 2007, Tyson paid four "extra" minutes beyond production time to all production employees as compensation for donning and doffing and related activities. Tyson calls this "K Code" time.

34. On February 4, 2007, the company added its calculation of the pre- and post-shift walking time at the Storm Lake facility to the amount of time employees in various job positions were determined in 1998 to spend performing the various pre- and post-shift activities.

35. From February 4, 2007 to June 28, 2010, Tyson ceased paying non-knife-wielding employees for their time spent donning and doffing company-issued sanitary and protective items and equipment.

37. From February 4, 2007 to June 28, 2010, Tyson paid knife wielding employees between 4 and 8 extra minutes in addition to production time for donning and doffing their protective items and equipment and related activities.

38. After February 4, 2007, K code time ranged from 4 to 8 minutes a day for anyone who received it, and the amount of time depended on the job; employees who did not work with a knife received no K code time after February 4, 2007.

39. Prior to February 4, 2007, K code time was intended by Tyson to compensate employees who worked in any department where a knife was used for donning, doffing, and rinsing of certain equipment that is unique to the meat-processing industry. Specifically, the 4 minutes of K code time was intended to

pay for time spent on the following activities: pre- and post-shift donning and doffing of the mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, plexiglass arm guard, mesh sleeve, and membrane skinner gloves; post-shift gathering of the equipment just mentioned; walking from the production line to the wash stations; post-shift waiting at the wash stations and rinsing of clothing and equipment; and pre- and post-shift "dipping" of some equipment in a sterilizing solution and any time spent waiting at the dip tanks.

40. Starting February 4, 2007, K code time was paid only to employees who used a knife, but the number of minutes was increased to cover the time spent walking before shift from the locker room to the production floor, and walking after shift from the wash station to the locker room.

41. Before June 28, 2010, production workers at Storm Lake got two breaks during a typical 8- hour shift. The first break was a paid 15-minute break, and the second break was an unpaid 30 minute break.

44. Production employees at the Storm lake facility are "guaranteed hours" of paid time up to a certain number of hours per week for a certain number of weeks per year that they reported to work.

45. Hourly workers at the Storm Lake plant tend to work a significant amount of overtime on a weekly basis.

46. Hourly, non-clerical employees who work 40 or more hours in a week are entitled to be paid overtime at a rate of time-and-one-half of their regular rate of pay.

47. Wage rates at the Storm Lake plant for hourly production employees in 2009 ranged from a starting wage of $11 per hour to a maximum of $15.50 an hour.

TIMES DETERMINED BY DR. MERICLE FOR FABRICATION DEPARTMENT

TABLE 5 OF REPORT

ACTIVITY NUMBER	ACTIVITY	AVERAGE TIME (MINUTES & HUNDREDTHS)	OBSERVATIONS
1	Don equipment preshift at locker	4.56	88
2	Dip scabbard and wash hands	0.17	120
4	Don equipment preshift in department	2.38	23
5	Doff equipment pre lunch	0.78	159
6	Don equipment post lunch	2.40	76
7	Doff/clean equip post shift in department	1.30	28
8	Inspect and disinfect at door post shift	0.10	18
9	Doff/store equipment post shift in locker room	3.40	21
10	Total walking time	2.92	N.A.

Total Donning, Doffing, Washing & Walking **18.00 Minutes**

TIMES DETERMINED BY DR. MERICLE FOR KILL DEPARTMENT

TABLE 6 OF REPORT

ACTIVITY NUMBER	ACTIVITY	AVERAGE TIME (MINUTES & HUNDREDTHS)	OBSERVATIONS
11	Don equipment preshift at locker	6.40	51
12	Don equipment preshift in department	2.06	11
13	Doff equipment pre lunch	1.22	44
14	Don equipment post lunch	2.14	38
15	Doff/clean equip post shift in department	2.37	52
16	Doff post shift at locker	3.53	15
20	Total walking time	3.54	N.A.

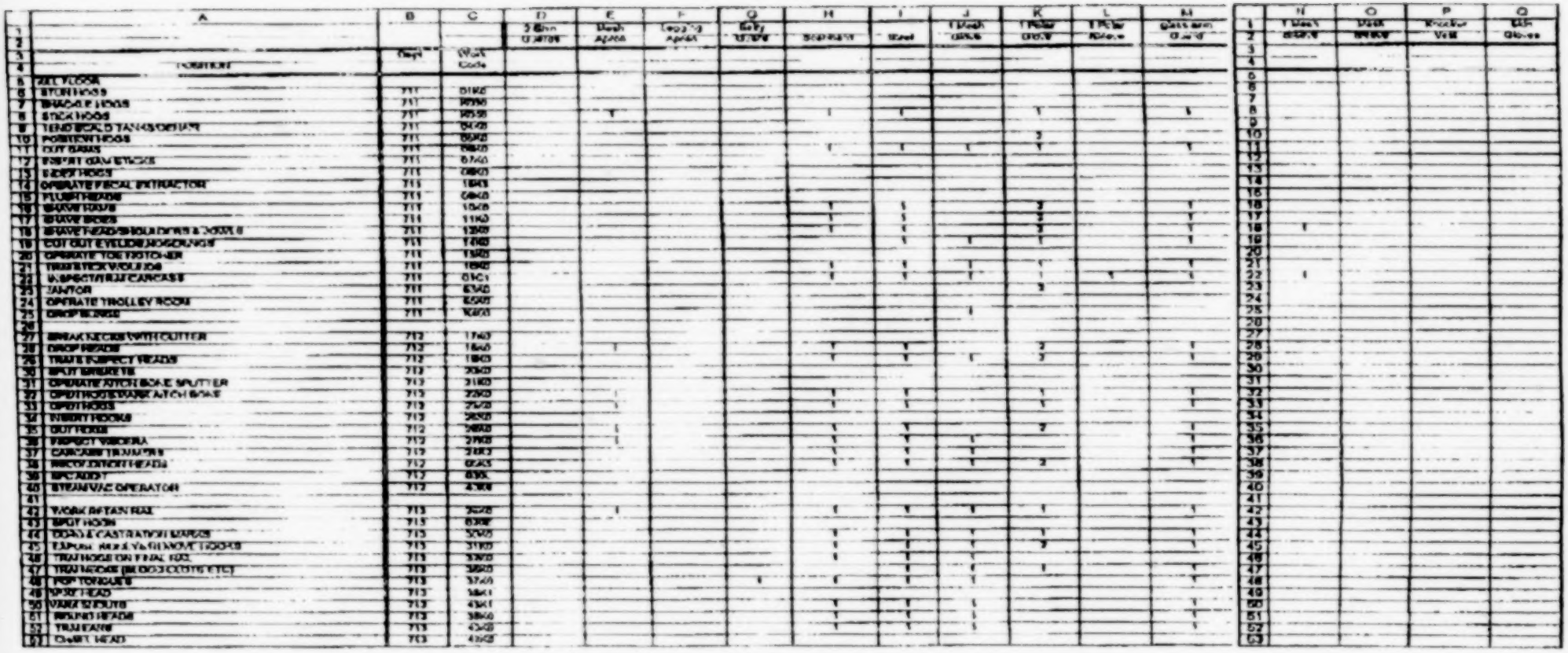
Total Donning, Doffing, Washing & Walking **21.25 Minutes**

From: Sandoval, Jorge
Sent: Tuesday, June 5, 2007 10:52 AM
To: Garcia, Michelle
Subject: FW: STL Equip Lists
Attachments: STL Equip Lists.xls

FYI every job we have in the plant, required PPE

From: Rahman, Masudur
Sent: Tuesday, June 5, 2007 10:16 AM
To: Sandoval, Jorge
Subject: STL Equip Lists

Please verify



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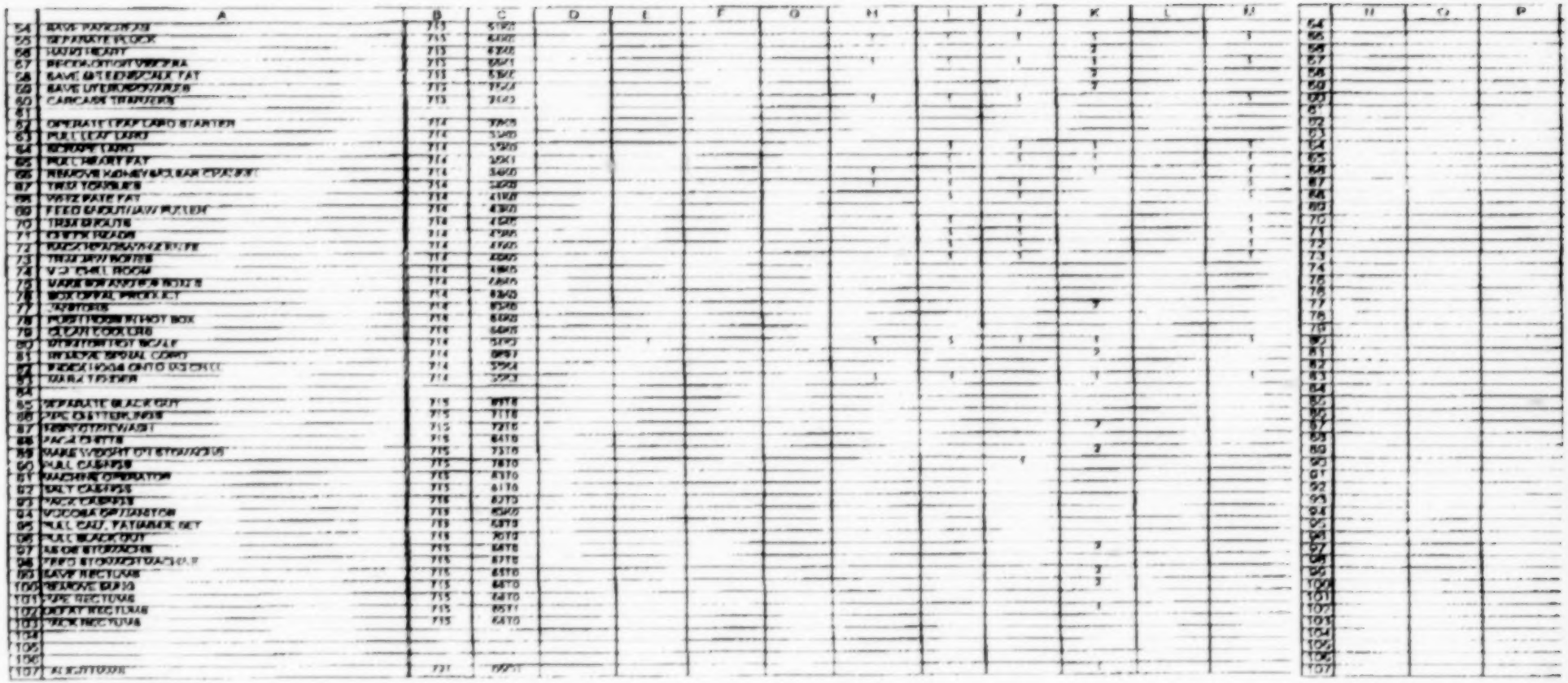

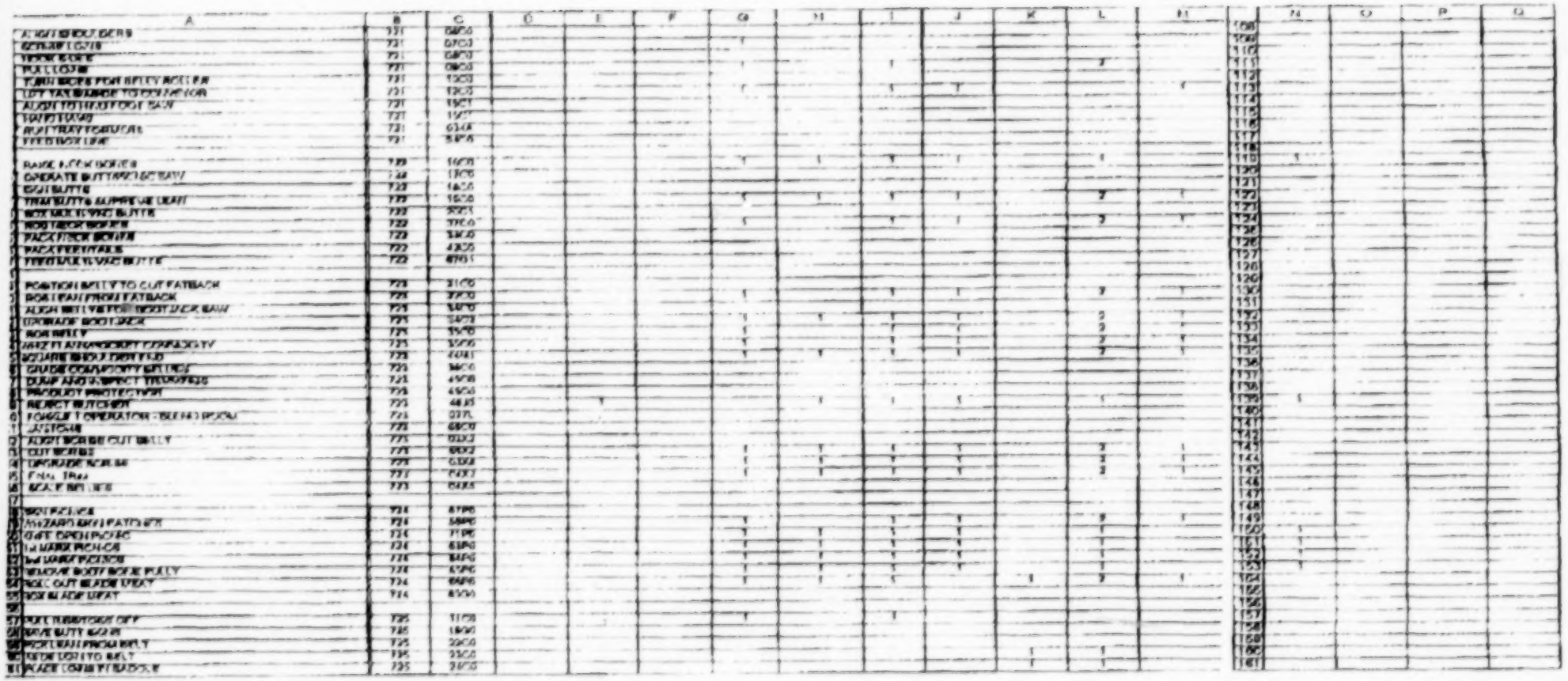

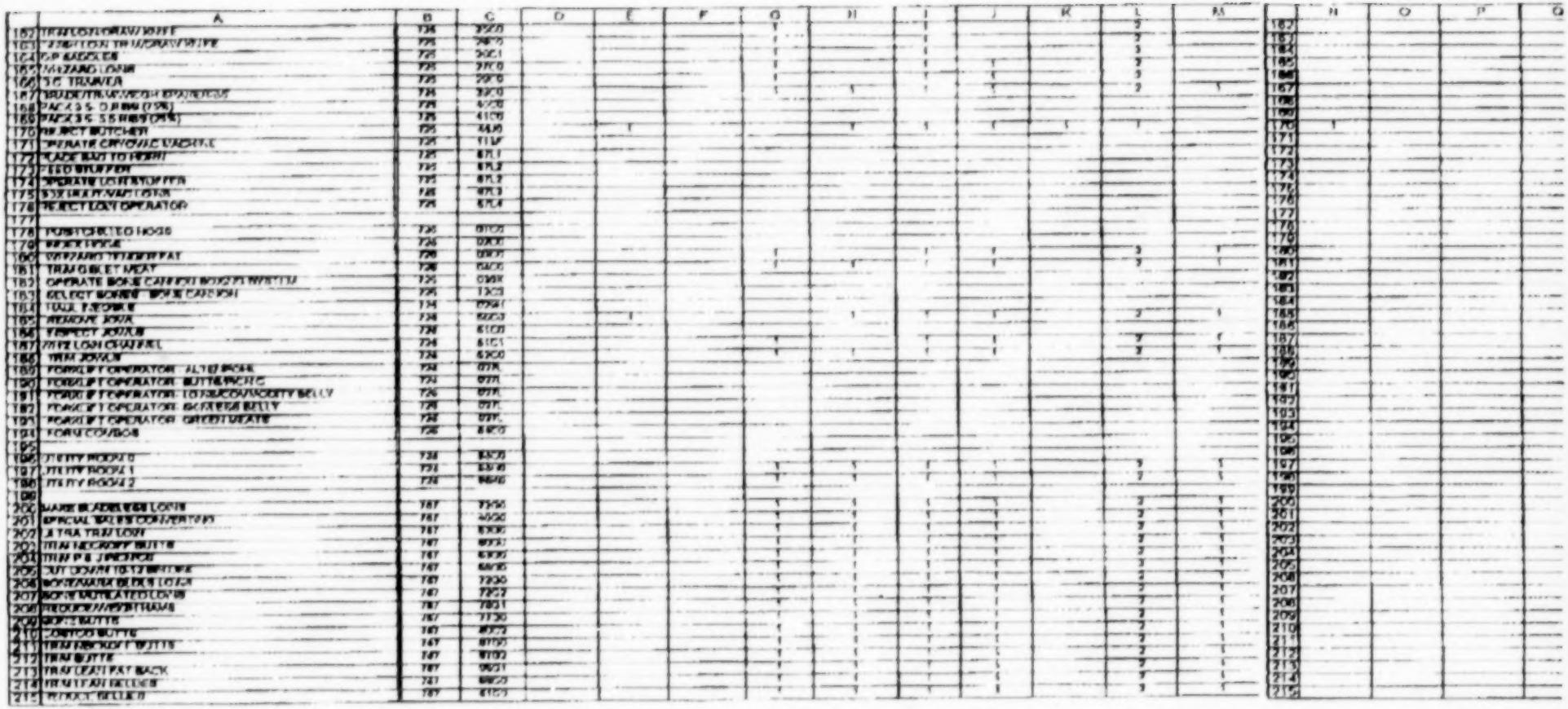

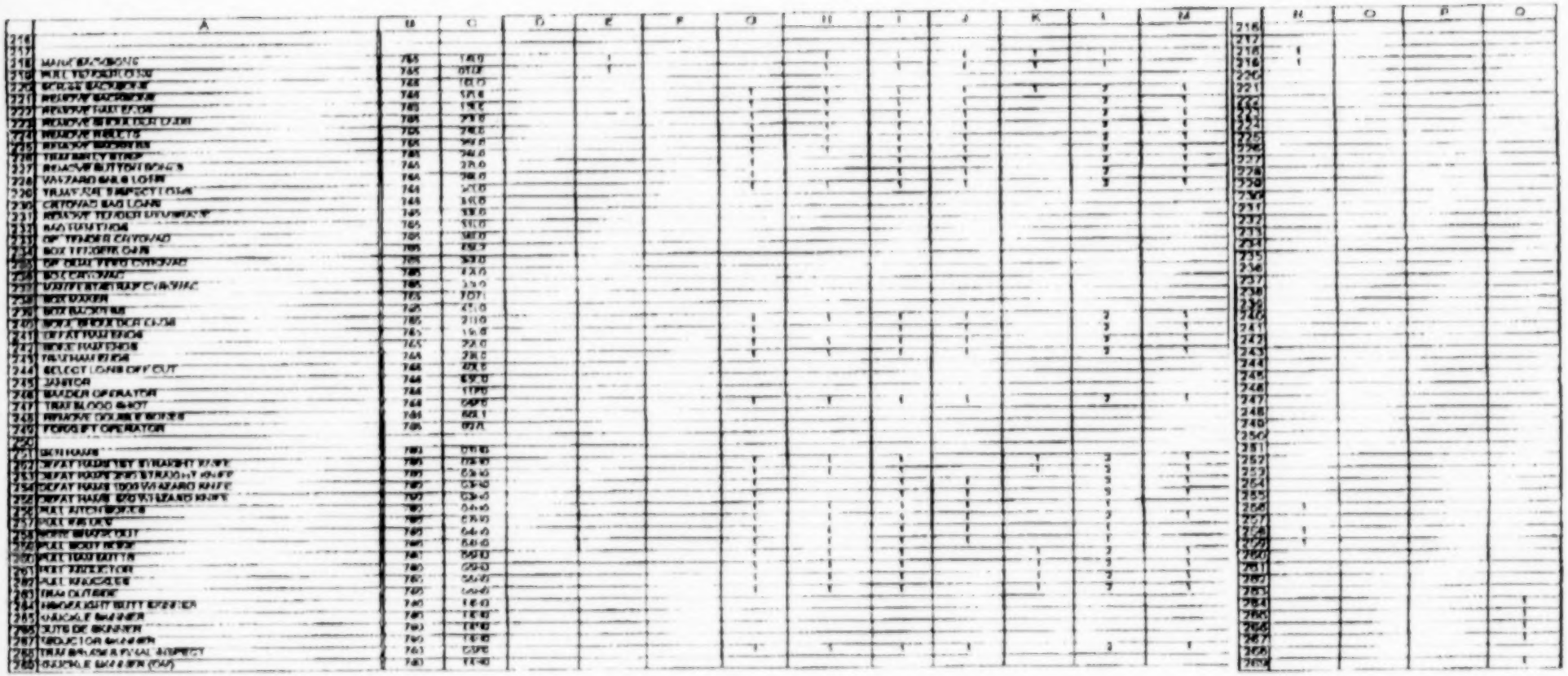

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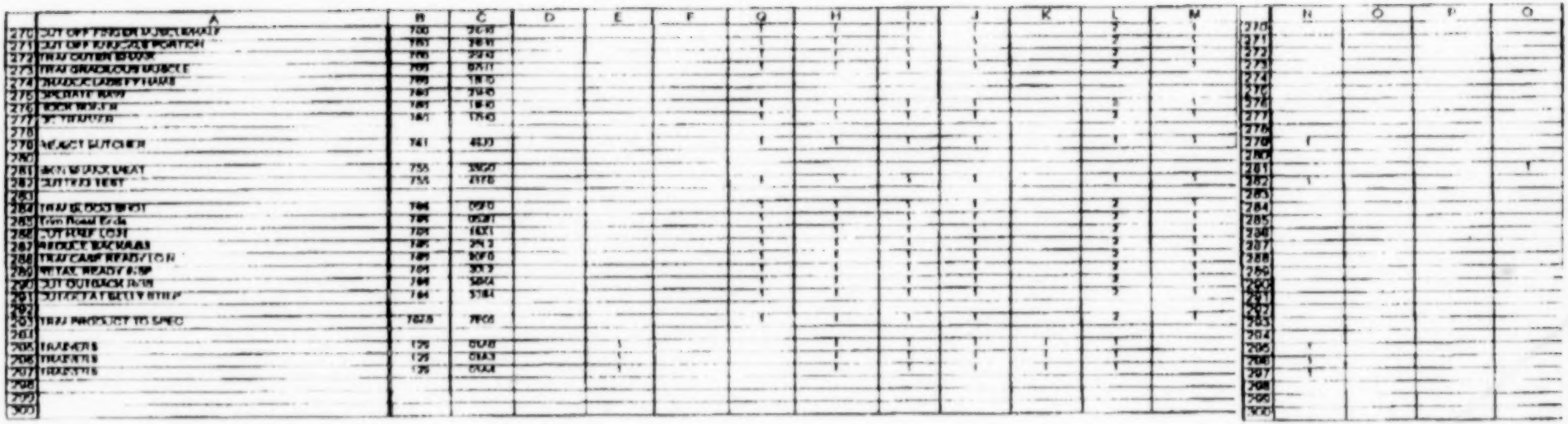
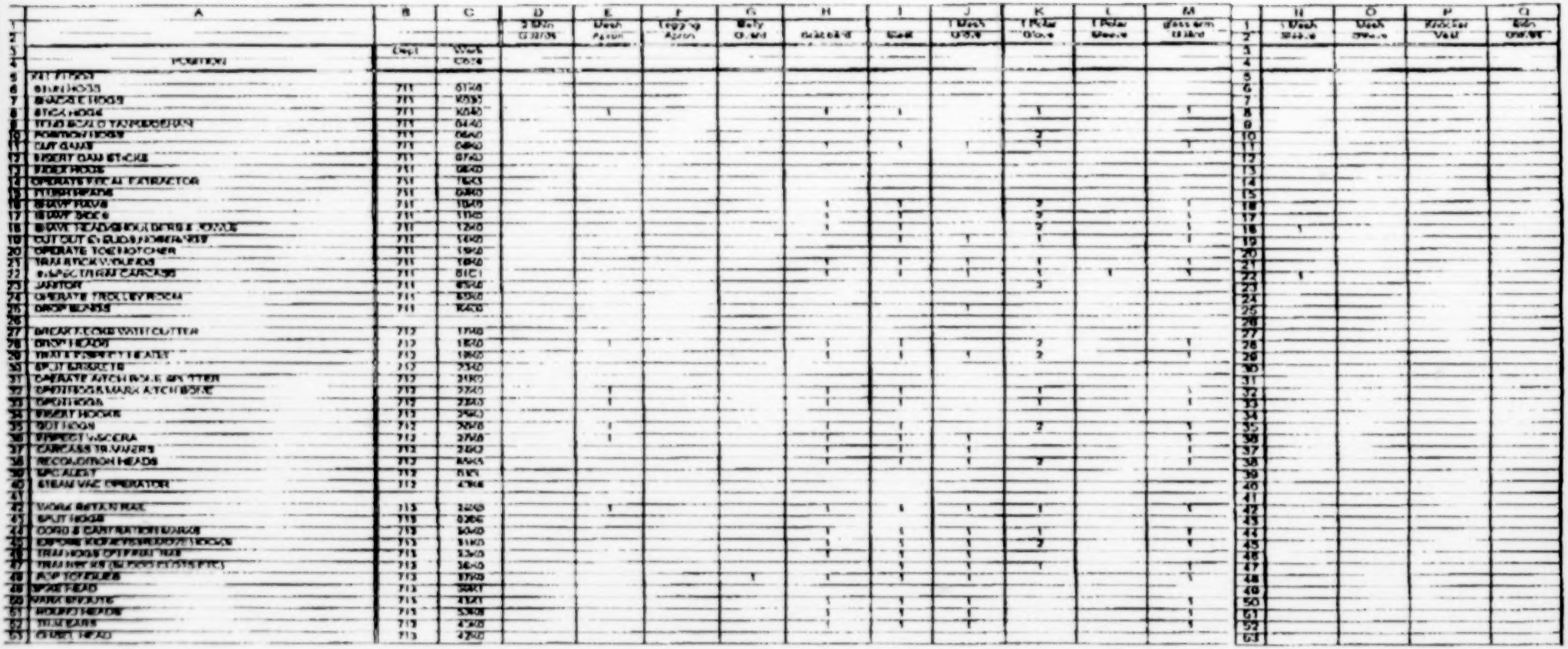


From:	Rahman, Masudur
Sent:	Tuesday, June 05, 2007 10:16 AM
To:	Sandoval, Jorge
Subject:	STL Equip Lists
Attachments:	STL Equip Lists.xls

Please verify



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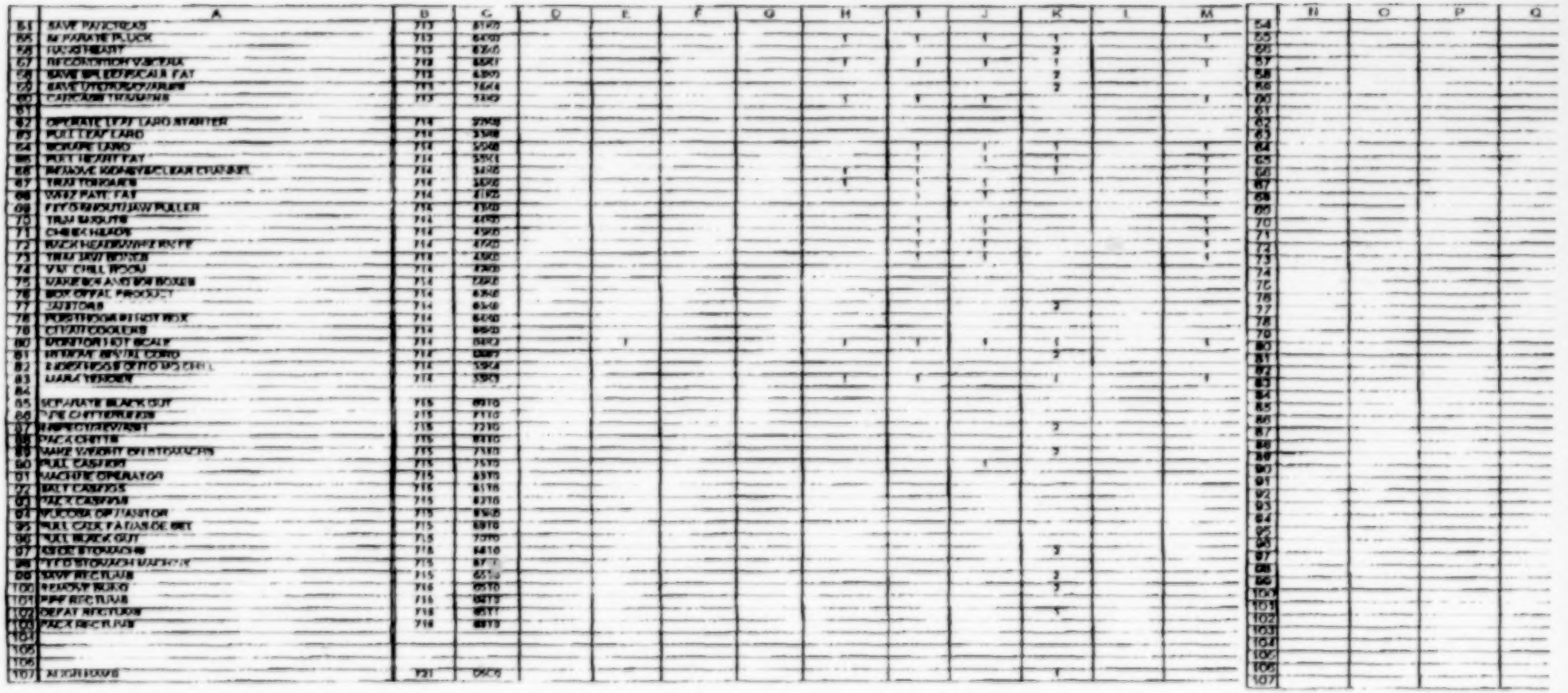

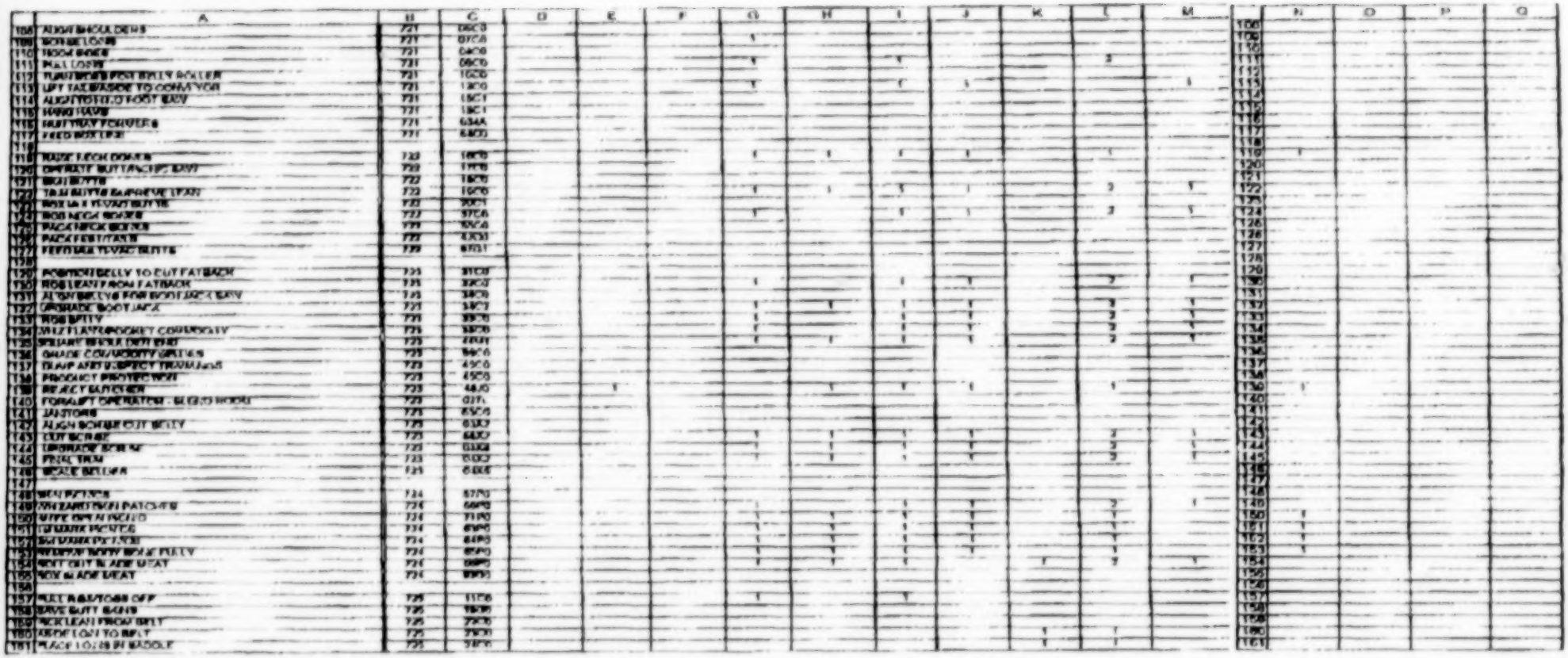

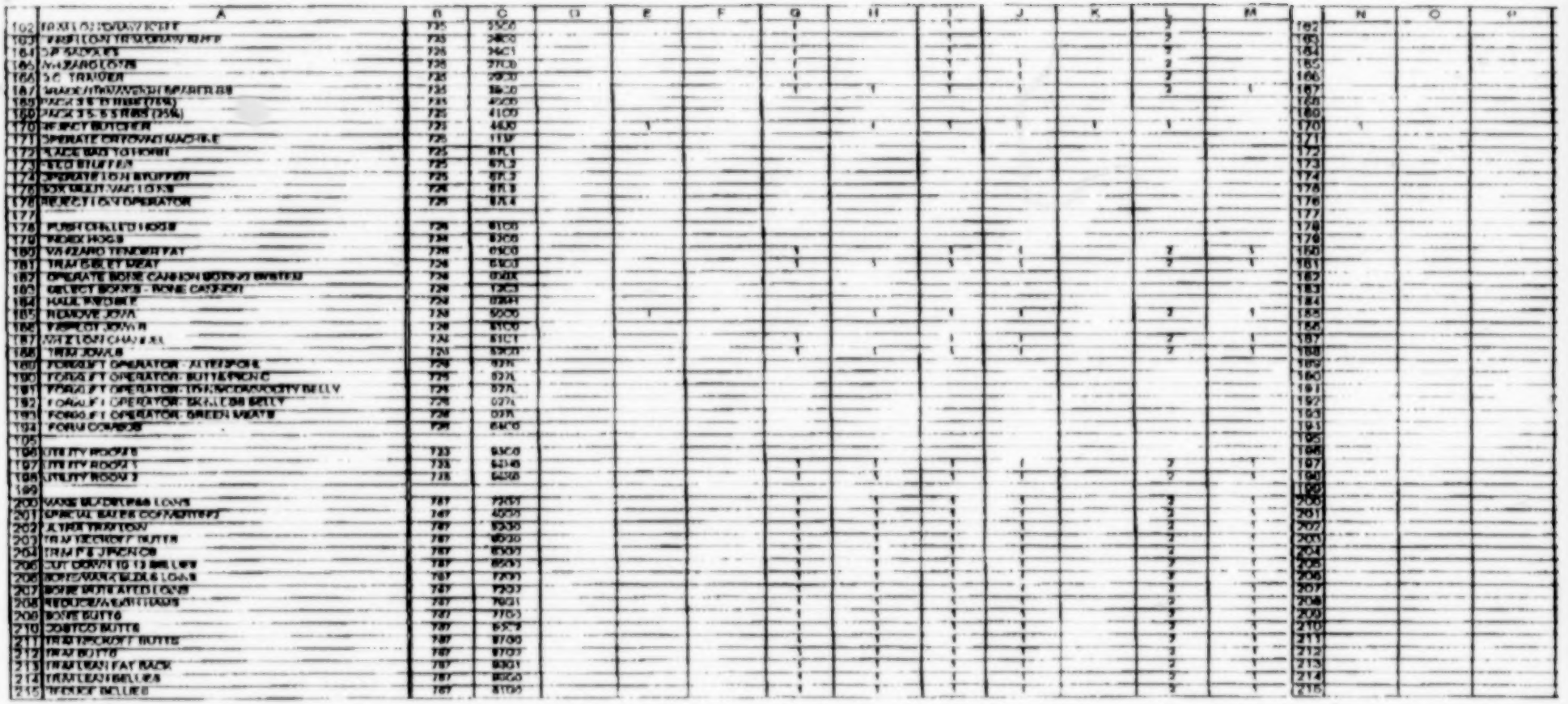

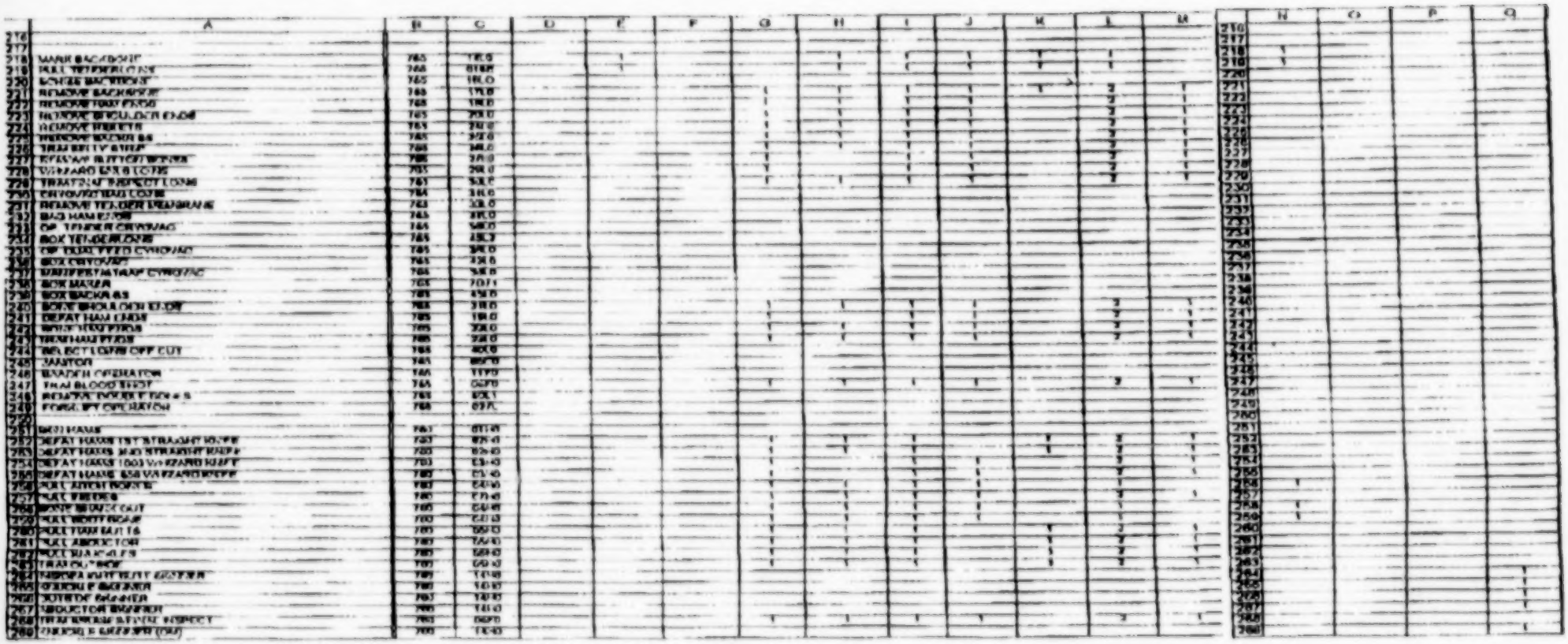

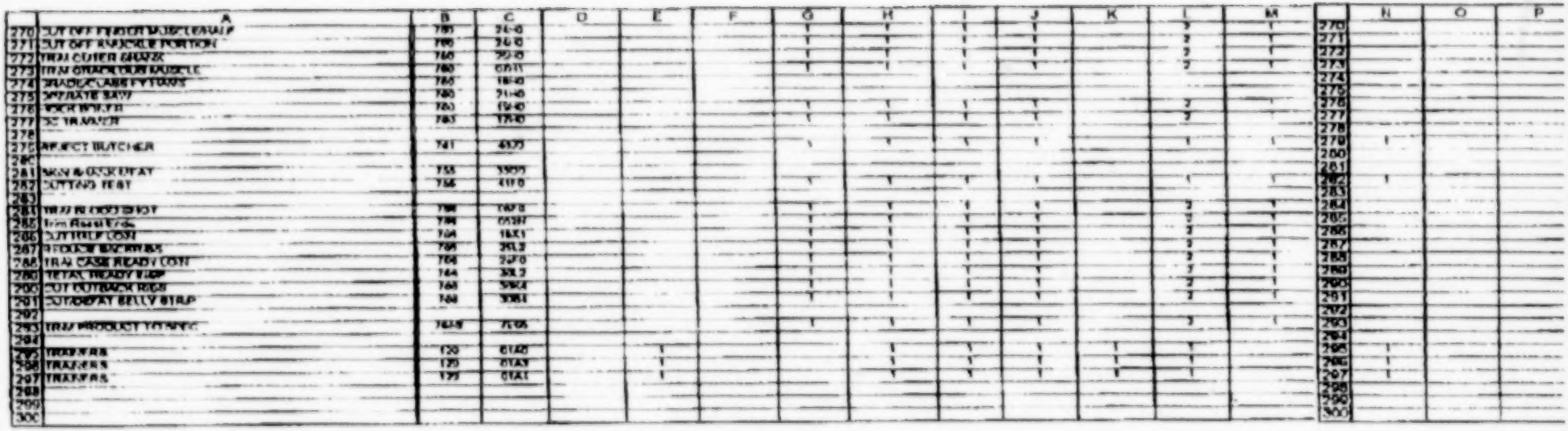

139

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Time Spent on Work-Related Activities Using Dr. Mericle's Conclusions of 18.00 Minutes for Fabrication Departments and 21.25 Minutes for Kill Departments for Donning, Doffing, Cleaning, and Walking

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	440	$1,611,702.44
Iowa Class	2,850	$6,686,082.36

Notes. Damages were computed for Gang-Time Jobs only.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 11 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

140

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Walking Time Between March 31, 2004 and February 3, 2007 Using 2.92 Minutes for Fabrication Departments and 3.54 Minutes for Kill Departments

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	352	$127,895.91
Iowa Class	1,686	$413,434.71

Notes. Damages were computed for those days between March 31, 2004 and February 3, 2007 where a Gang-Time job was worked.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 7 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

141

Estimate of Damages Due to the FLSA and Iowa Classes for Uncompensated Time Spent on Work-Related Activities Using 15.00 Minutes for Fabrication and Kill Departments for Donning, Doffing, Cleaning, and Walking

[Filed: 09/27/11]

Class	Number Awarded Damages	Damages
FLSA Class	438	$1,184,227.26
Iowa Class	2,740	$4,903,621.51

Notes. Damages were computed for Gang-Time Jobs only.

Damages were eliminated for individuals whose damages amount was less than $50.

Damages for the FLSA Class include damages for 9 additional individuals since it could not be determined which individual was the actual opt-in plaintiff.

Dr. Mericle's Observed Times Vary Widely

Fabrication (Cut and Retrim)

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	88	.583	10.333
Pre-shift: dip scabbard, wash hands	120	.010	.580
Pre-shift: don equipment in department	23	1.017	5.133
Pre-lunch: doff equipment	Less than one minute	.033	3.917
Post-lunch: don equipment		.450	5.650
Post-shift: doff, clean equipment in department	28	.300	3.567
Post-shift: inspect, disinfect at door	18	.033	.383
Post-shift: doff, store equipment at locker	21	1.783	9.267

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Dr. Mericle's Observed Times Vary Widely

Kill

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	51	2.100	13.283
Pre-shift: don equipment in department	11	.917	4.550
Pre-lunch: doff equipment	Less than one minute	.417	2.683
Post-lunch: don equipment		.500	6.350
Post-shift: doff, clean equipment in department	52	.200	5.750
Post-shift: doff at locker	15	1.967	5.517

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. 5:07-cv-4009

PEG BOUAPHAKEO, et al, individually and on behalf of a class of others similarly situated,

Plaintiffs,

vs

TYSON FOODS, INC.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

* * * *

[40] JOHN ANTHONY SEBBEN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good afternoon, Mr. Sebben. Give us your full name.

A. John Anthony Sebben.

Q. You and I have not met before, have we?

A. Not that I recall.

Q. All right. By whom are you employed?

A. Tyson.

[41] Q. And where?

A. In Storm Lake.

Q. How long have you been at the Storm Lake plant?

A. I have been at Storm Lake since 1982.

Q. All right. And you're a manager?

A. Yes.

Q. And what are you a manager of?

A. Kill floor.

Q. And tell us what the kill floor is.

A. The kill floor is where they—they begin the processing of the hog, they slaughter—it is the slaughter process, they dehair the hog, eviscerate the hog, and prepare it for the processing.

Q. Have you worked anywhere since 1982 other than at the Storm Lake plant?

A. No.

Q. All right. Now, when did Tyson take over the Storm Lake plant or buy it?

A. I don't recall the year for sure.

Q. Give me your best estimate.

A. I believe—I believe it was '92 maybe.

Q. '92? Was it—wasn't it more like 2001 or 2?

A. I don't recall the date.

Q. Okay. Now, your job is called general supervisor?

A. Yes.

* * * *

[45] Q. Okay. Now, on the first floor in the—what is that called, that department?

A. There's a retrim department and a cut department.

Q. Is that—those two departments are normally known as processing?

A. Yes.

* * * *

[55] Q. All right. Now, you also have—we've also heard here today, you weren't in the room, but I am sure you know about it, that the company at some point paid four minutes for what is called donning and doffing time or K-code time. You are familiar with that, correct?

A. I am familiar with K-code and donning and doffing, but I don't deal with that directly at all.

Q. That's the point of my question. This tracking, this daily time report that is done for the gang time where you are trying to get it right to pay for the actual time, no one is doing that for the donning and doffing time, are they?

A. I don't understand the question.

Q. Well, there's no—there's no assistant supervisors, supervisors or managers who are checking the time spent on donning, doffing, washing, or sanitizing the company equipment before gang time begins?

A. We don't police that.

Q. Right. Okay. You just—someone else in the company just pays a flat time no matter how much time it takes?

A. I don't know that. I don't deal with that, sir.

Q. At least no one in the—on the production team that works with the employees out on the floor is keeping up with the [56] actual time spent on donning, doffing, or washing or sanitizing the company equipment, are they?

A. No, we don't.

* * * *

Q. All right. Let's look at slide four. Maybe I didn't put it right. This is an agreement—I want to see if you agree with it for your department. This is Stipulated Fact No. 17. It says, "Employees are required to stow such knife-related items as equipment in their lockers at the end of their shift except for items that require or need laundering or items that require or need replacement." Is that true for your 200 some odd employees?

A. Yes, they place their equipment in their locker at the end of shift or in, their laundry bag for laundering.

* * * *

[57] Q. Okay. So I am—in the morning, the first thing that is required by Tyson of its employees is to go fetch the company equipment so they can transport it to the production line, correct?

A. That's—they're required to have their equipment when they go to their job site.

Q. Okay. Is 17, this is a stipulation—this is not—that is not it. Slide—what did I say, slide five, isn't it? That is not five. Here we go. For your 200 and some odd employees, is number 23 a correct statement when it says that, "Production employees go to their lockers at the start of their shift to obtain their individual supply bag in which Tyson has put their sanitary items

and equipment that requires laundering between shifts, such as the company-issued frock, cotton gloves, [58] Polar gloves, and Polar sleeves?"

A. Yes, that would be true, they need to retrieve those and carry them to their job station.

Q. Okay. And then number 24 is true for your employees also, that the knife-wielding employees go to their lockers at the start of their shift to get their knife-related items and equipment?

A. Yes.

* * * *

[64] Q. Okay. And the next item is—we covered steel, what did we not cover? Looks like we covered all the items on that. Now, let's go to slide—I keep losing this one. Let me look at it real quick. What is the one on the whites? Do you have one on the whites? Are your employees required to put on pants and a shirt issued by the company that are known as whites?

A. Yes, they are.

Q. Do you see those in front of you?

A. Yes, they are.

Q. All right. And kill employees under your supervision [65] are required to wear these pants and shirt?

A. Yes, they are.

* * * *

[67] Q. Okay. Now, are employees in your department required to keep their whites clean?

A. They are required to put them in their laundry bag at the end of shift.

MR. WIGGINS: Your Honor, may I publish—I offer Exhibits 328 and 337.

MS. BURKHARDT: No objection.

THE COURT: Received.

BY MR. WIGGINS:

Q. I have seen company policies that say if your whites get bloody or greasy or not really kept clean during the shift, they're required to be replaced and get another, correct?

A. If—that would be a case-by-case basis. If there is a situation that requires a person to change their clothing, it would be done on company time, it would be replaced and sent to change.

Q. Yes, but because that's while the gang time is going on, correct?

A. Yes, sir.

[68] Q. All right. But the—if the employee gets greasy or bloody or all these other items that come with handling the slaughter of animals and they're required to go change their whites, that's going to take time away from production, correct?

A. The manager in charge of that line will have to—to arrange his people so that he can still perform his tasks and still get the employee out to do that.

Q. That is something you like your employees to avoid is time away from the production line while it is running, if possible?

A. That is something that is a natural occurrence on the floor and we're trained to deal with it.

Q. But you also are trained to keep it to the extent possible to a minimum, correct?

A. When dealing with livestock like we do, there's—there's pathology involved that we have no control over. We accept that fact, we understand that fact, and we—we deal with it in regard to helping people change their clothes.

Q. And the way employees normally keep their whites clean so they don't have to go change them all the time is to wear this plastic apron?

A. Yes, sir.

Q. And so that's something really necessary for the employee to be able to do their job effectively and efficiently, correct?

[69] A. It is necessary for them to—yes, we require them to wear aprons.

* * * *

[77] Q. And you—all right. Now, when the employee—we [78] established earlier that the employee must come in to the locker room to pick up all these items, put some on, carry others out to the production line, correct?

A. Yes.

* * * *

[79] Q. All right. I want to turn to one of the rules that that is referring to. Turn over to Rule 44 on page four of this Exhibit 153. That's not it. Exhibit 153. There you go. Number 44. You cut off a few words. I will try to add them in. Rule 44 says, "While team members are putting on their equipment, they should leave the rest of their PPE hanging in their lockers and put them on directly from there. Do not lay them on the bench or floor." Now, that is what you expect of your employees, correct?

A. Yes.

Q. That's important to prevent adulteration or contamination of the meat by contaminating the sanitary items themselves, correct?

A. Yes, I wouldn't consider the bench sanitary.

Q. When it says PPE, "Should leave the rest of their PPE hanging in their lockers." What is a PPE?

A. Personal protective equipment.

* * * *

[83] Q. Okay. And the reason they're transporting these various items from where they store it—where you require them to store them at night over to the line is because you want them to sanitize them on the way to the line, correct?

A. Yes, we do require that.

* * * *

[89] Q. But you admit that the company policy in writing to the employees is they must wash their hands thoroughly with an [90] approved hand washing and sanitizing compound in an adequate hand washing facility before starting to work, correct?

A. Yes.

Q. They are required to do all that after each break, correct?

A. Yes.

Q. And they are required to do it anytime they left the production area and are coming back, correct?

A. Yes.

Q. And that's because you are trying to protect against adulteration of the meat you are selling your customers, correct?

A. Yes.

Q. You don't want employees going into the restroom, going outside, or doing anything outside the production area without thoroughly washing and sanitizing their hands with an approved compound, do you?

A. No.

Q. But that is done off of gang time, correct?

A. Well, it would—depending upon when they went. I mean, people going to the restroom during the course of the day would be on gang time, would be an example of being on gang time.

Q. But it says up here that you must do these things, the words say, "Before starting to work." Isn't that referring to [91] before gang time?

A. I can't answer that for sure.

Q. Okay. Well, what work do they perform before gang time in your opinion?

A. Well, it says wash hands before returning to work. That to me is—would indicate they've left the job for a number of reasons and they're required to wash before they go back to the job. An example again would be if they went to the bathroom.

Q. Okay. I am going to get to the things during the day in a minute, but right now I am on this sentence, the part that says, "Before starting to work." Isn't that the morning?

A. Okay. Before starting work.

Q. That's before gang time starts, correct?

A. Yes.

Q. So that's on unpaid time, correct?

A. Yes.

* * * *

[92] Q. And like at the end of the day he is required to carry his company equipment and take it off, hang it up before he is allowed to leave the production area and go to the cafeteria or the bathroom or outside, right?

A. Yes, that's true.

* * * *

[94] Q. Now, employees are required to be on the line fully dressed ready to work the very second that gang time begins, correct?

A. Yes, when a product gets to their work station.

Q. So that. means in the morning they are also doing all these activities we talked about, they're picking up, they're transporting, sanitizing, the donning, before they get to the [95] gang time start time, correct?

A. Yes.

Q. So that's all on unpaid time?

A. Yes.

Q. Let's talk a little bit about the end of the day. At the end of the day the same is true, as we showed—as you told us about at the break, that is they're paid only to the minute they step off the line or the second they step off the line, correct?

A. That's my understanding.

Q. Okay. And at that point your kill employees have to take their knives, their scabbards, and these various things we have seen that they are cutting the meat with and working with, they can't leave them on the line, can they?

A. No.

Q. The company wants them to transport that for them, for the company, correct?

A. Yes, they're responsible for their equipment.

Q. The company wants the employee on unpaid time to transport these knives and these scabbards and all these items over and sanitize and scrub them away from the production line, correct?

A. Yes.

* * * *

[97] Q. And you would agree that the company requires its employees to get all the blood and the grease and the viscera from the—from the workday off of them?

A. Yes.

Q. At the end of the shift before they go to the locker room, correct?

A. Yes, they get the majority of it off and then they launder many of the items that they work with during the day.

Q. And the company prohibits employees from putting dirty [98] frocks or whites or anything in the locker, correct?

A. Yes, we discourage that.

Q. And it requires the employees instead to take those laundry items and put them in a laundry bag at the end of the shift, right?

A. If there's—yes.

Q. And that's a bag with a PIN number or their locker number?

A. Yes.

Q. And they put all the items like the whites and the various cloth items, what you call the Kevlar, Polar glove, sleeve, you didn't say the rubber gloves, all those type of items, they go into the bag, the bag is—it is a mesh bag, right?

A. Yes.

Q. And then it goes to the laundry in the bag and is laundered while still in the bag, correct?

A. Yes.

Q. And then once it dries it comes back into the employee locker?

A. Yes.

Q. The employee comes in and all his stuff is down in the bag, it is sort of mixed up because it has been in the washing machine, right?

A. Yes.

[99] Q. The employee has to take it all out and straighten it out and get it ready to use for the next day when they get there in the morning, correct?

A. Yes, they retrieve it from their bag.

Q. Now, would you agree that preventing contamination of the meat is paramount to Tyson?

A. It is a very important part of our process, yes.

Q. Well, it is—it is the most important item in terms of being able to sell your meat that is unadulterated, correct?

A. Yes, sir.

* * * *

[141] Q. What do the team members have to wash at the end of their shift?

A. They are required to wash their hard hat, their knives and scabbard, their mesh glove, and to rinse their apron off.

Q. I want to show you a video, it is a video that the Plaintiffs' expert, Dr. Mericle, took while he was in the plant, this is a video that the Plaintiffs have provided to us.

MS. BURKHARDT: Conni, can you pull up the video and just before you play it, just let it—let us take a look at it? 87.

MR. WIGGINS: Exhibit 87?

MS. BURKHARDT: It is video clip sequence 87. Can you stop it for a moment?

Q. All right. Mr. Sebben, can you just take a look at what we have up on the screen before we play it and tell me if you can tell where this individual is.

A. This is on the kill floor. It is the wash area in the—more in the center of the kill floor.

Q. Can you tell whether this employee is a kill floor employee or a processing floor employee?

A. He's kill floor, he has whites on.

Q. All right.

MS. BURKHARDT: Connie, can you back it up so it starts at the beginning? Before you play it, I want to ask one [142] more question.

Q. Mr. Sebben, can you tell us what the time is in the bottom right-hand corner of the video?

A. 3:59:35.

Q. So can you tell from this—let's watch the video then I can ask you that question. I am going to have you watch the video. If you can just tell the jury what this employee is doing right here.

A. This employee is hosing off their boots, their scabbard with the knives in it, and giving their—their apron a quick rinse.

Q. Does he appear to be finished with all of his post-shift washing?

A. Based on the direction he's walking, he's leaving the floor.

Q. So does that indicate to you that he's finished with his washing?

A. That's what that would indicate to me.

Q. Can you tell me what time the—it shows on the video right now?

A. 3:59:45.

Q. And about how long based on the start time of the video did it take this individual to do this rinsing? If we need to play it again, we can do that for you.

A. I don't recall the start time.

[143] Q. Okay.

MS. BURKHARDT: Connie, do you want to start it again?

THE WITNESS: Okay. It was about 12 seconds.

BY MS. BURKHARDT:

Q. When this employee walked up to the washroom, was it crowded?

A. It does not appear to be.

Q. Did he have to wait to use the hoses in the washroom?

A. No.

Q. Is what we have seen here in this video a normal occurrence that you would see on the kill floor?

A. It can be, but obviously with the amount of hoses there, there are times when they're all filled, you know; but there's a good continuous flow through there.

Q. And the amount of time it took the employee to rinse off his equipment, is that a normal amount of time that you might see?

A. It can vary. That—that's a—that's pretty quick.

Q. Would this be—would it be unusual to see someone do it this quickly?

A. No, no, not at all.

MS. BURKHARDT: Your Honor, I want to move the video clip into evidence as Defendant's 2241.

MR. WIGGINS: No objection.

THE COURT: 2241 is received.

[144] BY MS. BURKHARDT:

Q. Mr. Sebben, I am going to show you another video clip.

MS. BURKHARDT: Connie, if you can pull up segment 49.

MR. WIGGINS: Your Honor, I think we're—we are using different exhibit numbers on these than what we can correlate to. Can we use the original exhibit numbers?

MR. MUELLER: That was the exhibit number. I am looking for the original exhibit number for this one.

THE COURT: You filed an amended exhibit list just before trial. Is that the one we are referring to right now?

MR. MUELLER: After the final pretrial conference we gave the Plaintiffs a list of what we were going to call some of these clips and gave them numbers just for convenience and I will find that for you, Mr. Wiggins.

MR. WIGGINS: I would appreciate it.

BY MS. BURKHARDT:

Q. Mr. Sebben, again, this is a video that Dr. Mericle, Plaintiffs' expert in this case, took when he was in our plant so it is a video that the Plaintiffs gave to us. Can you tell where we are in the plant?

A. This would be the second wash station on the kill floor.

Q. I am going to direct your attention to the employee in the back right-hand corner, this woman right here. (Indicating) If you can look up behind you and see what I am pointing to, [145] this woman back here. (Indicating) Okay?

A. Yes.

Q. Can you tell what department she works in?

A. That would be a kill floor person based on their whites that they're wearing.

Q. What time does the video show in the bottom right-hand corner?

A. 10:06:01 p.m.

Q. From—based on that time can you tell whether this is an A shift or a B shift employee?

A. 10:06 p.m. would be B shift employee.

Q. As you watch the video, I am going to ask you to tell the jury what the employee is doing and if you can also note the time that we are starting, I am going to ask you how long it took her to do those activities.

MS. BURKHARDT: Connie, if you want to play that video.

Q. What is the employee doing right now?

A. Well, she's putting on a nylon glove right now.

Q. And what is she doing now?

A. And putting on a rubber glove it appeared like.

Q. She is going to come back into our view here in a second. Now, what does it look like she's doing?

A. Now she's putting on a mesh glove.

Q. Does it appear crowded to you in the washroom?

[146] A. No, it doesn't. She has her knife sharpening implement with her.

Q. In her hand?

A. Yes.

Q. And what was the last item she picked up?

A. Her apron.

Q. In your experience do some employees carry their knife equipment and their aprons out of the washroom?

A. Yes.

Q. And they would don those on the way to the work station?

A. Some do, yes.

Q. And if you could—

MS. BURKHARDT: Why don't you start that from the beginning again, Connie.

Q. Take a look at the start time for this video. Go ahead. You can play it. Mr. Sebben, what is the end time we have there on the video?

A. 10:06:32.

Q. So about how long did it take her to put on all of her gloves, grab her knife equipment and her apron and head out to the floor?

A. It appears like 31 seconds.

Q. Is this a normal sequence or occurrence that you might see on the kill floor?

[147] A. It would appear that way to me, yes.

Q. Is the amount of time it took this woman to do these activities a normal amount of time it might take somebody?

A. Yes, they become very efficient at putting on their equipment.

* * * *

[150] Q. Mr. Sebben, you are looking at Plaintiffs' Exhibit 301 which is an equipment list for the Storm Lake plant. I just want you to walk the jury through this document. Can you tell us first of all what the list of items in the right-hand column under the title Position are?

A. That would be equipment worn by the employees when they do their job.

Q. And do you see the column titled Position?

A. Yes.

Q. You can pull that microphone in front of you if that's easier. You can kind of adjust it so you don't have to keep reaching over if you want to pull your—there you go. The column next to the position column where it says D-E-P-T, what does that represent?

A. The department they work in.

Q. And the next column under Work Code, what does that represent?

A. That would be the work code for the job.

Q. Is that also sometimes referred to as a job code?

A. Yes.

Q. And the row across the top there that starts with two shin guards, what are those items?

A. Those are items that—protective equipment items.

[151] Q. And can you just quickly read off for the jury what each column—what each protective equipment item is there?

A. Do you want me to read the top column?

Q. Yes, just the top rows.

A. Okay. Two shin guards, mesh apron, legging apron, belly guard, scabbard, steel, one mesh glove, one Polar glove, one Polar sleeve, glass arm guard, one mesh sleeve, mesh sleeve, knocker vest, and skinner gloves.

Q. Now, we looked at a number of those items, you identified them yesterday. Did we see a knocker vest yesterday?

A. I did not see a knocker vest.

Q. Is that an item that would be used at the Storm Lake plant?

A. No.

Q. What about shin guards, did we see shin guards yesterday?

A. No, we did not.

Q. Are you aware of any employees at the Storm Lake plant that use shin guards?

A. No, I'm not.

Q. All right. Did we see something called a legging apron yesterday?

A. No.

Q. And are you aware of any employees at the Storm Lake plant that use a legging apron?

[152] A. No, they don't.

Q. Okay. Looking at this document, can you tell the jury what the numbers in the columns represent?

A. The numbers in the columns to me would represent the—that they do indeed wear that piece of equipment and how many.

Q. Okay. So, for example, let's look at the position shave hams which is on line 16 of the document.

A. Okay.

Q. Do you see that?

A. Yes.

Q. What items does that position—what items does that position require to wear based on this document?

A. One scabbard, one steel, two Polar gloves, and one Plexiglass arm guard.

Q. That column says glass arm guard, is that really the Plexiglass arm guard we looked at?

A. Yes, it is.

Q. Okay. How do you know from looking at this document that those are the items that are required for the shave hams position?

A. Because they're designated as such in the box.

* * * *

[153] Q. Mr. Sebben, are you familiar with the jobs that are listed there in the Position column?

A. Yes, I am.

Q. Are those jobs that are on the kill floor?

A. Yes.

Q. And are you familiar with the equipment that is required for the jobs on the kill floor that you supervise?

A. I am familiar with most.

Q. Okay. And are you familiar with the shave hams position?

A. Yes.

Q. If you look—you indicated that the shave hams [154] position is required to wear the Plexiglass arm guards. Are there other positions on the kill floor that are not required to wear the Plexiglass arm guard?

A. Yes.

Q. And looking at—

MR. WIGGINS: Your Honor, I am going to object again. This is really sort of a massive leading question. He's being prompted to read down a document. It is not showing any personal knowledge.

THE COURT: He works on the kill floor. He supervises the kill floor. He would know presumably whether every position wears an arm guard or not. Overruled.

BY MS. BURKHARDT:

Q. Mr. Sebben, can you give us an example of some of the positions that are not required to wear a Plexiglass arm guard?

A. Janitor would be one, trolley room operator would be one, those are two that come to mind.

Q. Let's look at line 23 which is the janitor position which is one that you just mentioned. Are you familiar with the janitor position on the kill floor?

A. Yes, I am.

Q. Is that position different than the janitor position in the maintenance department?

A. Yes, it is.

Q. And what does a janitor on the kill floor do? What's [155] their job duties?

A. Janitor on the kill floor is in charge of housekeeping and general pickup of product that would be on the floor, trimmings on the floor, and some washdown.

Q. And if you would look at line 23 for the janitor position, what items are required for the janitor position on the kill floor?

A. Two Polar bear gloves.

Q. Is the janitor position on the kill floor required to wear any other safety items?

A. No.

Q. Are there items that the shave hams position wears that the janitor position is not required to wear?

A. Yes.

Q. What are some examples of that equipment that the shave hams position is required to wear, but the janitor is not?

A. Scabbard, steel, arm guard.

Q. And so does that—in your experience do some positions on the kill floor wear certain equipment and other positions wear different equipment?

A. Yes, they do.

Q. In your experience do the positions on the kill floor generally wear different equipment based on the job?

A. Yes.

Q. Let's look at one more position, let's look at line 86 [156] which is pipe chitterlings. Is pipe chitterlings a position on the kill floor that you supervise?

A. It is a position in the chitts department. It is part of the kill floor.

Q. You supervise the chitts department, right?

A. Pardon me?

Q. Do you supervise the chitts department?

A. Yes, I oversee that.

Q. What does the pipe chitterlings position do?

A. They—the chitterling is the intestine and they put it on a water nozzle, a water pipe and push it into a machine like this. (Indicating)

Q. Are you familiar with an employee who is a Plaintiff in this case named Leticia Montes?

A. Yes.

Q. Did Ms. Montes work in the pipe chitterlings position?

A. I believe she has.

Q. What safety equipment does the pipe chitterlings—what safety equipment is the pipe chitterlings position required to wear?

A. Nothing from a safety standpoint.

Q. So are there some positions on the kill floor that aren't required to wear any knife-related safety equipment?

A. Yes.

Q. Can employees choose to wear standard items and PPE [157] that are not required?

A. Yes.

Q. Do employees sometimes choose to wear items that are not required?

A. Yes, they do.

Q. Now, Mr. Wiggins showed you some items yesterday that he had you identify like the frock, the hair net, the whites, the mesh gloves, and some other items. Do you recall seeing those?

A. Yes.

Q. Can you tell me about how many jobs on the kill floor wear—are required to wear safety glasses?

A. It would be—this is somewhat of a guess here—30.

Q. And do you know about how many positions there are on the kill floor?

A. There are 135.

Q. So about 100 of those positions would not be required to wear safety glasses?

A. As well as I can recall, yes.

Q. You will recall Mr. Wiggins showed you that yellow plastic rain suit, the two pieces. Do you recall seeing that?

A. Yes.

Q. Are there any positions on the kill floor where that yellow plastic rain suit is required?

A. No.

[158] Q. And you also recall Mr. Wiggins showed you a plastic apron. Are there certain positions on the kill floor that are required to wear that plastic apron?

A. Yes.

Q. Do you know about what percentage of the jobs on the kill floor are required to wear the plastic apron?

A. I believe most would be required to wear the apron.

* * * *

[174] Q. Oh, 1:00 a.m. okay. All right. Now, in relationship to just taking that one person as an example, would you agree that the length of time it takes people to put things on and take them off varies from person to person?

A. Yes.

Q. Varies sometimes by how old they are or whether they've got arthritis or whether they're disabled or by various things?

A. It is more situational, for instance, if they feel they have some latitude on their time to get to the line or if they're—if they're hurrying a little more to get to the line.

Q. You said some people get efficient. Those are the longer-term employees?

A. I don't know how—I can't tell you how long it becomes to—you have to work to become efficient at putting on your equipment. There's certainly a learning curve.

Q. And you do agree that the time it takes is not a flat four minutes for every person, is it?

A. No, I already stated it varies.

* * * *

[176] WILLIAM EMORY SAGER II,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Sager.

A. Good morning.

Q. We have not met before, have we?

A. We have not.

Q. You were deposed by some other lawyers in this case under oath, correct?

A. I was.

Q. Okay. You heard the last witness, I had asked him about what your role in discipline is. Could you tell us?

A. Yes, essentially what happens is when a supervisor has determined that there was an infraction of some sort, that will [177] be documented on a daily absentee report which comes in to the personnel office daily. The clerks will then take that and they will type up the discipline, the discipline will then cross my desk, I will review it, initial it, and then I will send it off to the department.

Q. And your desk is in the personnel department. What is your job?

A. I'm the complex human resources manager.

Q. Okay. And so what you just described is a regular part of your official duties at the company, is that correct?

A. Yes, it is.

Q. What other duties do you have as the complex human resource director?

A. I oversee various departments to include the health services department, training department, security, as well as employment.

Q. All right. And in that job you have to be familiar with the company policies, correct?

A. I do.

Q. You couldn't really discipline somebody if you didn't know what the rules were, could you?

A. Correct. There are times I have to reference them; but yes.

Q. Okay. And you are familiar with the company policies on—for example, gang time, correct?

[178] A. Yes.

Q. And tell us what gang time is.

A. Gang time is the amount of time that production workers are performing their work. It starts when the first piece of product passes their work station and it ends when the last piece of product passes their work station.

Q. All right. And employees are required to be fully dressed with all this equipment we went over with Mr. Sager—Sebben and on the line ready to work at the moment that paid time begins, correct?

A. That's correct.

Q. That's a company requirement, correct?

A. Correct.

Q. And they can be disciplined if they're not fully dressed, fully scrubbed, sanitized, these various activities we've heard about, on the line, ready to work the moment paid time begins, correct?

A. Strictly speaking, yes.

Q. And before that gang time begins though, employees have had to do certain activities that the company requires them to do, correct?

A. Correct.

Q. And that is true for all production—all hourly employees in the production department, correct?

A. Correct.

* * * *

[181] Q. And by the same token then employees have done various activities that the company requires of them as a part of their job before they get to those punch clocks, correct?

A. That's correct.

Q. But even at the point in time in which they reach the punch clocks, are they going to have to perform some more activities after they punch for the company that the company requires before their gang time begins, correct?

[182] A. If that is in reference to dipping the equipment, then that is correct.

Q. And it is in reference to transporting and carrying equipment to the line too, correct?

A. That is correct.

Q. Part of the transporting of this company equipment from where you require them to store it in the locker room to the line, a part of it is before the punch clock, a part of it is after the punch clock, but none of it is on gang time, correct?

A. That is correct.

Q. And that's true for all production employees, all 1,300 of them?

A. I believe so, yes.

Q. Now, you said you have 1,300, but that's—that's at any one point in time, correct?

A. It's 1,300 approximately total for both shifts.

Q. But that is on a particular day, correct?

A. Yes.

Q. Okay. And you have a policy that employees are required to follow that they cannot punch in more than seven minutes before their gang time begins, correct?

A. That is not correct. It is actually a guideline.

Q. Well, it is something that the employees are trained on, correct?

[183] A. They are.

Q. And it is something the employees are expected to follow, correct?

A. Correct.

* * * *

[184] Q. And that's the purpose of the seven-minute rule as I understand it from your testimony in your deposition is to spot those situations where an employee might actually be doing work before gang time so you can get them paid, get them their actual hours paid?

[185] A. Yes, that's correct.

Q. And that's because on gang time you are very scrupulous in checking every day to make sure to see that the actual hours spent are paid for, correct?

A. Yes.

Q. For example, if someone comes in late, let's say they come in late by a minute, they are supposed to be there at 6:00, they clock in at 6:01, the supervisor is supposed to check that out too, correct?

A. Yes.

Q. And the supervisor—if he is not happy with the excuse, he can dock that one minute from the pay?

A. That's correct.

Q. By the same token if the—if the employee leaves early in the afternoon, the supervisors are responsible for checking that and making a decision as to whether the person should be paid or not paid till the end of the gang time, correct?

A. That is correct.

Q. And if the employee worked past gang time, the supervisors are responsible every day to make sure that you track the actual time spent beyond gang time that somebody might be doing something for the company, correct?

A. Yes, that is correct.

* * * *

[186] Q. So we know then that the company has a time system in place where it is administratively practical to keep up with the employees' time down to the minute, correct?

MS. PASCHAL: Objection. Foundation, and it is a legal issue that is going to be before the jury.

THE COURT: Wait just a minute.

[187] THE COURT: Overruled. Answer the question. Do you remember it?

THE WITNESS: No, Your Honor. Could you repeat, please?

THE COURT: So we know then that the company has a time system in place where it is administratively practical to keep up with the employees' time down to the minute, correct?

THE WITNESS: Yes, that is correct.

BY MR. WIGGINS:

Q. As a matter of fact, you keep it down to the one hundredths of a minute, correct?

A. That I'm not sure of.

Q. Okay. But you don't do that for these activities before gang time begins, do you?

A. No.

Q. There's no one at Tyson's plant in Storm Lake who is trying to keep up with the actual time the employees are spending on these activities before gang time begins, correct?

A. That is correct.

Q. And there's no one at Tyson Storm Lake plant who is paying any attention to how much the actual time employees are spending performing activities for the company after gang time ends, is there?

A. No.

Q. And by the same token there is no one at the Tyson's [188] Storm Lake plant who is trying to keep up the actual time employees are doing these activities

for the company when they step off the line at the break and until they get back from the break, is there?

A. No, there is not.

* * * *

[191] Q. Tyson has made a determination that these mesh items are compensable and they pay for them or they claim to pay for them, correct?

MS. PASCHAL: Objection. Foundation.

THE COURT: Overruled. Answer the question, if you can.

THE WITNESS: Yes.

BY MR. WIGGINS:

Q. But this—this pay that goes for the mesh items does not include the white pants or the white shirt, does it?

A. It does not.

Q. It does not include the boots, does it?

A. It does not.

Q. Does not include the hard hat, the eyeglasses, the hair net, the beard net, the plastic apron, the rubber gloves, the Polar gloves, doesn't include any of those items, does it?

A. I would agree with you except for the Polar gloves which I do believe are part of the additional protective equipment.

[192] Q. You are right. If I said Polar, I was mistaken. Anything else that is not included in what you are claiming to pay employees for these activities?

A. I believe that's all correct.

Q. And Tyson does not pay for any activities whatsoever at the break time, does it?

A. No, it does not.

Q. And that includes the items that you admit are compensable, the mesh items and all those things we've seen? Let's put slide 10 up just to get focused. Do you remember this from yesterday where it says, "The parties agree that donning, doffing, and rinsing the following items is compensable." It lists mesh apron, belly guard, steel, scabbard, mesh glove, Polar gloves, Polar sleeve, Plexiglass arm guard, mesh sleeve, and membrane skinner gloves. My question is this: You don't pay anything for doing those things at the break, do you?

A. No, we do not.

Q. Now, this—some of this equipment we have seen, this mesh equipment, the way it is made it can get meat in it and blood and grease and things like that in it when you are working, right?

A. Yes.

Q. This vest, for example, is that right?

A. Yes.

Q. But to protect—and that can cause bacteria and [193] microorganisms and other things that can contaminate the meat?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: Yes, Your Honor.

THE COURT: Answer the question.

THE WITNESS: Yes, it's possible.

BY MR. WIGGINS:

Q. All right. But the—but the frock protects against that, correct?

A. Yes.

Q. Because if you wear the frock, it can't get in those webs in that mesh, correct?

A. Correct.

Q. And, in fact, you have testified in your deposition that the frock—that the frock is overtop the mesh items, correct?

A. Yes.

* * * *

[201] Q. And employees by and large normally, once they go to the locker room to get their equipment, they do proceed directly to the punch clock and then upstairs to the kill department or over to the processing department directly from the locker room, don't they?

[202] A. As a general rule, yes.

Q. And once the employee punches the clock they go on directly to the production floor, correct?

A. As a general rule, yes.

Q. Because the punch clock is right outside the production door, isn't it?

A. Yes.

Q. At the end of the day when the employee gang time ends, for which the time that he's being paid for on gang time ends the minute he steps off the line, correct?

A. Yes, that's correct.

Q. They are not allowed to leave their equipment, their knives and that type of thing, on the production line, are they?

A. No, they're not.

Q. The company requires them to take all of their equipment, including their knives, their saws, and things that you store in their locker, take them away from the production line and to begin to wash and sanitize certain of them, correct?

A. The washing part is correct, yes.

Q. What is it that the company requires to be washed or sanitized at the end of the shift after they stop being paid on gang time?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: As a general rule, yes, Your Honor.

[203] THE COURT: Answer the question.

THE WITNESS: Basically anything that has come in contact with product, knives, belly guard, hard hat, boots, to be actually washed and then if it's clothing equipment, that will be thrown straight into the laundry bag and then laundered.

BY MR. WIGGINS:

Q. All right. Tell us what that—what are the things that go in the bag?

A. It would be the frock, the whites, Kevlar sleeves, Kevlar gloves, rubber gloves, mesh sleeves, apron, plastic sleeves.

Q. Plastic sleeves go in the bag?

A. Yes.

Q. And the bag is in the locker room, correct?

A. Yes.

Q. It is in each person's locker, correct?

A. Correct.

Q. It has a pin on it that has a number for that locker, correct?

A. Yes.

Q. All the items are put in this mesh bag, isn't it? It is a mesh bag of some kind?

A. It is.

Q. All right. All items that you've named are put in the mesh bag and it is pinned by the employee, correct?

[204] A. Yes, that's correct.

Q. And they are not free to leave the plant until they've pinned that bag, are they?

A. I would agree with that.

Q. And all that time from when they stepped off the line to the time they get all this done and pin that bag, when they're free to go, they're not being paid for that, are they?

A. No.

* * * *

[207] Q. Now, Tyson has a rule against employees putting anything that's got blood or dirt or things on it in the locker, correct?

A. In the locker itself?

Q. Yes.

A. Yes.

Q. Okay. Tyson requires the employees not to put their frocks, whites, these other items that go in the bag in the locker because they could build up microorganisms and bacteria and that thing overnight and the next morning contaminate the meat, correct?

A. Yes, that's correct.

Q. And that's why you are paying these laundry room employees to do all that laundry while the employee has gone home after he's pinned the bag, correct?

A. Yes.

* * * *

[208] Q. Employees at the Storm Lake plant average about 48 hours a week?

A. Between 40 and 48 depending on the season.

Q. But for the year the average is 48, that was your testimony in your deposition, correct?

A. During that time, yes, that's correct.

Q. That was 2009 I think, is that correct, your deposition?

A. I believe so, yes.

Q. Has that changed?

A. The amount of hours worked as an average is totally [209] dependent upon the market and scheduling.

Q. At the time of your deposition, let's get the date—

MS. PASCHAL: Objection, Your Honor. I don't believe this is proper impeachment.

MR. WIGGINS: I am not trying to impeach, I am trying to get a date, Your Honor.

THE COURT: Yeah. But his deposition isn't relevant outside of impeachment. The objection is sustained.

BY MR. WIGGINS:

Q. At the time of your deposition you testified that the employees averaged 48 hours a week and you couldn't recall any weeks that they worked just 40, didn't you?

MS. PASCHAL: Same objection, Your Honor.

THE COURT: Sustained. Just ask him the question. In 2009 what were they doing? But reference to the deposition in the absence of an attempted impeachment is improper.

MR. WIGGINS: All right.

Q. You said at the time of your deposition the average was 48 hours, correct?

A. If that's what is in the deposition, then yes, it would have been correct.

* * * *

[219] Q. Now, let's go to the definition there of 3.3. It defines outer garment and aprons, frocks, smocks, plastic sleeves, gloves, and other outer clothing worn by team members who handle product. Outer garment is typically company-issued clothing that covers a team member's personal clothes, correct?

A. Yes.

Q. All right. Now, and it says—let's go to Section 1.0 of the document, do you see there where it says Policy Purpose and the purpose of the policy is, quote, "To define personal hygiene practices intended to prevent product contamination," correct?

A. Yes.

Q. And you agree with that, correct?

A. Yes, I agree.

Q. Let's then look at Rule 5.2.2 on outer garments on page two of Exhibit 232. That says, using the term outer garments, it says this: "Outer garments will not be allowed in break rooms, restrooms, maintenance shops, or any other area outside the immediate production area except for cleaning and storage of the smocks," correct?

A. Yes, that's correct.

[220] Q. That's Tyson's policy at the Storm Lake plant, correct?

A. Yes.

Q. And the break room, is that another word for the cafeteria?

A. Yes, they're synonymous.

Q. So outer garments are prohibited from being worn in the cafeteria by Tyson, correct?

A. During break times, yes.

Q. Okay. And outer garments as we saw the definition are prohibited from going into the restrooms, correct?

A. Yes.

Q. And outer garments are prohibited from going outside the plant, correct?

A. Correct.

Q. So employees are not allowed to take them home, are they, because that would be outside the plant?

A. There may be instances where they would take them home and launder them.

Q. Well—

A. Rare, very rare, but it is possible.

Q. The policy is that employees are not to take their outer garments outside the plant, correct?

A. Correct.

Q. So if an employee were to come into the plant and want [221] to go from the plant over to the administration building, pass through security, they would be prohibited from doing that with their outer garments on, correct?

A. Yes.

Q. And let's look at Rule 5.2.6 right below the one we are looking at there of this same policy. That section of the policy says, "All persons working in contact with product, food contact surfaces, and product packaging materials must adhere to hygienic practices while on duty to prevent adulteration of product and the creation of unsanitary conditions," correct?

A. Correct.

Q. And that is the requirement that Tyson expects its production employees to comply with, right?

A. Yes, that's correct.

Q. And then the next section, 5.2.6, it gets a little bit more detailed about the same subject. It says, "Aprons, frocks, and other outer clothing worn by team members who handle product must be of material that is disposable or washable. Clean garments must be worn at the start of each working day and garments must be changed during the day as often as necessary to prevent adulteration of product and the creation of unsanitary conditions," correct?

A. Correct.

Q. And that is the requirement that Tyson expects its production employees to comply with, correct?

[222] A. Correct.

Q. And that's why Tyson issues them these plastic aprons to wear over their whites or their smock so they don't get a buildup of blood or microorganisms or grease or other things that come from the animal that might contaminate the meat, right?

MS. PASCHAL: Objection. Foundation.

THE COURT: Do you know the answer to that?

THE WITNESS: I believe that is correct.

* * * *

[229] Q. When the company goes to the trouble to buy certain pieces of equipment, to furnish it to the employees, to wash it or to give them the means to wash it themselves, it is because the company considers that this is an item that an employee might need to actually perform their job, correct?

A. Yes, that's correct.

* * * *

[236] Q. In early 2010 what was the starting hourly wage at the Storm Lake plant?

A. It was $11 an hour.

Q. And what was the overall range for hourly production [237] workers at that time?

A. At that time it would range anywhere from the $11 an hour start rate to a top rate of $15.80.

Q. How often does the plant review wage rates?

A. Wage reviews are conducted annually, normally right around the 1st of July.

Q. As a result of these wage reviews are rates usually adjusted?

A. Yes, they are.

Q. How so?

A. Every time that I've been there they've been adjusted up. The last two years in particular they've gone up 30 cents an hour each year.

Q. We've heard already about K-code time and that the K-code time is four minutes. Can you explain for us in general terms what the K-code time is designed to pay employees for?

A. Primarily the K-code is designed to pay our team members who are wearing more specialized protective equipment, in other words, equipment other than just the frock, the hard hat, the hair net, the earplugs, to compensate them for the donning and doffing of that equipment.

Q. So some of the mesh items that we have looked at and the Polar sleeves, are those items that are included in the K-code?

A. Yes, they are.

[238] Q. And is the washing of those items post-shift included in the K-code?

A. Yes.

Q. From June 2004—excuse me, from 2004 until June 2010 has the K-code ever been more than four minutes?

A. Yes, back in 2007 the K-code was modified to range anywhere from four to eight minutes depending on the job.

Q. Do you know when the K-code—actually let me back up for a moment. We're calling it a K-code. Is that a cost code?

A. Yes, essentially, yes.

Q. Is that something that is itemized or broken out on an employee's pay stub?

A. Yes, it is.

Q. Do you know when the K-code is actually added to an employee's time?

A. Yes, it's added to their time at the end of the week.

Q. Is it ever paid at the overtime rate?

A. Yes, it is.

Q. And when might that occur?

A. Anytime an employee's hours exceed 40, any hours that are added on after that are paid at time and a half.

Q. So if an employee has worked 40 hours Monday through Friday doing production work on gang time, then on Saturday when the K-code is added, how much of that K-code will be paid at the overtime rate?

[239] A. All of it.

Q. Mr. Sager, I know you have sat through the opening statements yesterday and I want to ask you a few questions about some statements Mr. Wiggins made during his opening statements. Mr. Wiggins characterized the mesh apron that we looked at as chain mail. Do you agree with that characterization?

A. No, I—I could see how someone might see it that way, but no, this is not armor. This is protective equipment.

Q. How common is the mesh apron at the plant?

A. Not very. Typically—not in all cases, okay, but typically a pregnant woman who cannot get a belly guard on because of the pregnancy would wear, for example, the mesh apron and the reason the mesh apron is not worn so much now I think as in the past is due to ergonomic factors because it can be rather heavy whereas the belly guard is much lighter weight and provides the same function.

Q. Other than situations in which a woman might want a mesh apron during pregnancy, are there many positions that wear the mesh apron?

A. Not that I am aware of, no.

Q. If you wear a mesh apron, would you also wear the belly guard on top of it or underneath it?

A. Not to my knowledge, no.

Q. So are those in effect alternatives to each other?

A. Yes.

[240] Q. We also saw a single mesh sleeve. Do employees usually just wear one mesh sleeve?

A. Yes, I would say if a mesh sleeve is being worn, when they're being worn, it is normally just one sleeve and that is on the non-knife arm.

Q. How common is the mesh sleeve compared to, for example, the Kevlar or cloth sleeve that we looked at?

A. I would say the Kevlar sleeves are much more prevalent than the mesh.

Q. Are there any team members who wear both the mesh apron and a mesh sleeve?

A. Perhaps, but not that I can think of off the top of my head.

* * * *

[244] Q. I notice that this lists both earplugs and earmuffs. Are those alternatives?

A. In most cases, yes. The team member can choose to utilize either the earplugs or the earmuffs; however, if a team member has experienced a—what I would call a significant hearing loss, they may be required to wear both.

Q. But can a team member choose to wear the earmuffs if they have find it more comfortable than the earplugs?

A. Yes.

Q. And are there team members that do that?

A. Yes.

Q. Is that something that the plant accommodates—

A. Yes.

Q. —by making those items available?

A. Yes, they can choose either one.

* * * *

[253] Q. Mr. Sager, what does this picture show us?

A. This is the main truck entrance to the plant.

Q. So is this the Storm Lake plant?

A. Yes.

Q. And if we could now pull up 2232-1, are we now inside the plant?

[254] A. Yes, we are.

Q. Where are we in this photograph?

A. This is the cut floor on the processing side.

Q. Do you know this individual?

A. I do.

Q. Do you know what her job is?

A. Yes, she is a person that is applying dry ice to product.

Q. Can you tell us what she is wearing?

A. Yes, she has on her hard hat, hair net, safety glasses, earplugs, yellow cotton gloves, and a frock.

Q. Are those her own shoes that she is wearing?

A. Yes, they are.

Q. Are those shoes—can she wear those shoes to and from the plant?

A. Yes, she can.

Q. Is she wearing any sort of mesh item?

A. No, she is not.

Q. Is she wearing a rubber apron?

A. No, she is not.

Q. Is she wearing any sort of plastic sleeve?

A. No, she is not.

Q. Wearing any sort of Kevlar item?

A. No.

Q. Let's now go to 2232-6. Where are we now?

[255] A. We are still on the cut floor.

Q. Do you know this individual?

A. I do.

Q. And where is he working?

A. He is working as I say on the cut floor, he's what we call a Cryovac operator and what a Cryovac is is a piece of machinery that allows us to vacuum seal product.

Q. And when you say you know him, do you know him by name?

A. I do.

Q. What is his name?

A. His name is Mark Sevchek.

Q. What is he wearing?

A. Mark is wearing a hard hat, hair net, frock, and the green rubber gloves and earplugs.

Q. Those glasses that he is wearing, are those his own glasses?

A. It appears they are, yes.

Q. Is he wearing any sort of mesh?

A. No.

Q. Wearing any sort of Kevlar?

A. No.

Q. Is he wearing a plastic apron?

A. No.

Q. Is this appropriate for his job, what he is wearing?

[256] A. Yes.

Q. Let's now look at 2232-7. Where are we now?

A. We are still on the cut floor, processing.

Q. Do you know this individual?

A. Yes, he do.

Q. Who is this?

A. This is Mitch Turnbull.

Q. And what is Mr. Turnbull's job position?

A. On this particular day he was what we call a mule driver which is an electrically powered palletized jack.

Q. Is this sort of like a type of forklift?

A. It is. It is. It is a type of forklift.

Q. What is he wearing?

A. Mitch is wearing the hard hat, hair net, earplugs, beard net, he's got on a safety vest, frock, yellow cotton gloves, and the issue rubber boots.

Q. So when you say the issue rubber boots, are those the boots he has obtained from the plant?

A. Yes.

Q. Can he wear those to and from home?

A. He can.

Q. Is he wearing any sort of mesh?

A. No, he is not.

Q. Is he wearing any sort of plastic sleeve?

A. No, he's not.

[257] Q. Let's go to 2232-12. Where is this in the plant?

A. This is in the retrim area, again on the processing side.

Q. Do you know this man?

A. Yes, I do.

Q. Who is he?

A. His name is Greg Paulsen.

Q. What is Mr. Paulsen wearing?

A. Greg has on the hard hat and he—he's wearing a little bit different type of hair net, this is what we call a hoodie which I believe was addressed yesterday. He's also got on a frock, earplugs, and his yellow—I'm sorry, green rubber gloves.

Q. What is he doing? What does his job appear to be?

A. On this day he was doing what we call sorting trim.

Q. Is he wearing any sort of mesh?

A. No.

Q. Is he wearing a plastic apron?

A. No.

Q. Is he wearing plastic sleeves?

A. No.

Q. Let's go to 2232-14, please. Do you know who this lady is?

A. Yes, I do.

Q. Who is she?

[258] A. Her name is Barb McCann, similar to Mark Sevchek, she's also a Cryovac machine operator.

Q. And is this in the cut area of the plant?

A. It is.

Q. When you say the Cryovac machine, what is a Cryovac?

A. Again, as I mentioned just a few minutes ago, it is a machine that allows us to vacuum seal product. The product is actually packaged in the specified plastic bags that you can see in this picture and she lays them out on a—it almost looks kind of like a cutting board, but it is a plate which runs through the machine, a vacuum chamber comes down onto the plate and vacuum seals the product into the bag.

Q. What is she wearing?

A. Barb has on the hard hat, hair net, frock, and green rubber gloves.

Q. Does it look like she's wearing earplugs as well?

A. I'm sorry, yes, she is.

Q. And the hair net she is wearing, this is not the hoodie hair net, right?

A. No, no, this is just the regular hair net.

Q. What kind of shoes is she wearing?

A. She is wearing her own personally purchased shoes.

Q. And is that something she could have worn to work that day?

A. Yes.

[259] Q. Let's go to 2232-17, please. Where are we in the plant now?

A. We're back in the retrim area on the processing side.

Q. And what are these ladies doing?

A. It looks like they're bagging ribs.

Q. And are they basically doing the same job or doing the job together?

A. Yes.

Q. Can you tell us what the lady on the left-hand side is wearing?

A. Yes, she's got on her hard hat, hair net, in this case earmuffs, she's also wearing a frock, blue plastic sleeves, and green rubber gloves.

Q. What is the lady on the right wearing?

A. The lady on the right is wearing hard hat, looks like she's got the hoodie on, earplugs, apron, rain suit or at least the top half of it, the apron and the green rubber gloves.

Q. Is she also wearing company-issued boots?

A. She does have on the company-issued boots as well.

Q. Is that optional for her? Is that something she could choose to wear?

A. Yes, in this area she could choose to wear a leather boot of her own purchasing if she so desired.

Q. The—you noted that the woman on the right is wearing a rain suit top, but the woman on the left is not. Is [260] that okay for one of these women to be wearing one and the other not to be?

A. Yes, it is a matter of choice in this case. It is optional.

Q. So the woman on the right has chosen to wear a rain suit top?

A. Yes.

Q. But she is not wearing the plastic sleeves, the woman on the right?

A. No. Instead of wearing the plastic sleeves she has opted just to wear the rain suit top.

Q. That rain suit top, is that something that is for her benefit?

A. Yes.

Q. And how does it provide her benefit?

A. It keeps her dry, drier probably than just wearing the apron alone. It also provides a certain degree of warmth as well.

Q. Is it cold on the processing floor?

A. Yes, it is typically anywhere from I would say 39 to 42 degrees.

Q. Is employee comfort and convenience one of the reasons why Tyson provides items such as the rain suit and the plastic sleeves?

A. Yes.

[261] Q. I see here the woman on the left is wearing the earmuffs and they appear to be attached to her hard hat?

A. Yes, they are. Earmuffs are actually attached to the hard hat. There are two little grooves on the edge and the earmuffs just clip into that.

Q. Can you keep them attached to your hard hat if you are going to wear the earmuffs?

A. Yes.

Q. What about if you are wearing regular earplugs, can you attach those to your hard hat?

A. Yes, in fact, the common practice is if you are wearing the earplugs, the earplugs, I think you saw them yesterday, actually come on a string connecting the two and normally what they will do is loop them through the adjustable headband on the hard hat.

Q. Can they keep them looped through the head—the band on the hard hat between shifts?

A. Absolutely, yes.

Q. So it stays together as one item?

A. Right.

Q. And you referred to the woman on the right wearing a hoodie. I can see that she's wearing some sort of hooded sweatshirt, but are you also referring to the type of hair net she is wearing?

A. I was referring to the hair net, but you are right, [262] she is wearing a hooded sweatshirt as well.

Q. And I see that the woman on the right is—appears to be standing on a green stand. What is that?

A. We call them ergo stands, ergo short for ergonomics. With as many team members as we have, we have a lot of various heights so what these stands allow for is, let's say, a shorter person may not be able to work as effectively or as ergonomically without the

stand as they could with the stand which is going to provide them with a little more height which means ergonomically it is going to be easier for them to do the job.

Q. Is that something the company has provided for her in her position?

A. Yes.

Q. Let's go to 2232-18. What part of the floor are we on now?

A. We're on the kill floor now.

Q. Do you know who this lady is?

A. Yes, that's Blanca Marquez.

Q. Do you know what she is doing?

A. I believe she's trimming snouts.

Q. What is she wearing clothingwise?

A. She's wearing the hard hat, hair net, safety glasses, earplugs, green rubber gloves, a mesh glove, and a white nylon glove on the left hand.

[263] Q. When you say she is wearing a mesh glove, is she just wearing that on one hand?

A. Yes.

Q. What is the implement she is holding?

A. She is holding what is called a Wizard knife. To let you know what a Wizard knife is, it is a motor-driven knife, you can see the cable that leads to the actual knife itself and it turns a cable which in turn turns a round blade that spins very fast and that's—the name of the manufacturer is Wizard and that's why they're called a Wizard knife.

Q. The mesh glove that she is wearing, is that on the hand she is not holding the knife in?

A. That's correct, it is on the non-knife hand.

Q. And is that usual to just have one mesh glove on the non-knife hand?

A. Yes.

Q. Is she wearing the white uniform that we saw earlier?

A. No.

Q. Does she appear to be wearing her own clothing?

A. She is.

Q. What is the company's guideline about wearing your own clothing on kill?

A. It is tolerated as long as it meets the specifications.

Q. By specifications, what are you referring to?

[264] A. Clean, white, presentable.

Q. And I notice here her pants are actually tan. Is that okay in her instance?

A. It is. It's tolerated. We have since tightened down on that a little bit to where we want to make sure everybody is wearing white pants, although they could be purchased from a store or something like that.

Q. So an employee on kill can bring their own white shirt and pants and wear those on the floor?

A. Yes, they can.

Q. In fact, that's what this lady appears to be doing?

A. Yes.

Q. Is she wearing any sort of belly guard?

A. No.

Q. Is she wearing a mesh apron?

A. No.

Q. Is she wearing any sort of Kevlar sleeve?

A. No.

Q. Is she wearing a mesh sleeve?

A. No.

Q. Does she appear to be wearing any sort of Polar glove?

A. I'm sorry?

Q. Does she appear to be wearing any sort of Polar glove?

A. Not that I can tell, no.

Q. Let's go to 2232-19. Where are we now?

[265] A. We are again on the kill floor.

Q. Do you know what job this man is performing?

A. It appears that he is filling a stainless steel bucket which he is holding in his right hand with cheek meat which is meat off the head of the hog and they will take those buckets and dry ice them.

Q. What does he appear to be wearing?

A. He is wearing a hard hat, hair net, earplugs, frock, and green rubber gloves along with his white—I'm sorry, I mentioned frock. Not a frock, but the white uniform shirt.

Q. Is this the same white uniform shirt that we saw yesterday?

A. Yes.

Q. He happens to be wearing it over something.

Q. What is that that he appears to be wearing his white shirt over?

A. It appears to be one of his own personal long-sleeved T-shirts or something like that.

Q. Is that something he could have worn from home to the plant?

A. Yes, it's possible.

Q. Is it okay for him to be dressed like this?

A. Yes, it is.

Q. So in this instance did he have to change out of his top, the pink colored top that he is wearing to put on his white [266] shirt or did he just put his white shirt over it?

A. If he wore it into the plant, he could just put a shirt on right over it.

Q. Is this man wearing a rubber apron?

A. No.

Q. And he's on the kill floor I believe you said.

A. Yes, he is.

Q. Is that okay that he's—are there certain jobs on the kill floor where people choose not to wear aprons?

A. Yes.

Q. Is he an example of one?

A. He is.

Q. Does he appear to be wearing any sort of mesh apron or mesh sleeve?

A. No.

Q. Is he wearing any sort of Kevlar sleeve?

A. No.

Q. And is he wearing the hoodie hair net or regular hair net?

A. He's wearing the regular hair net.

Q. Let's go to 2232-21. Where are we now?

A. We're still up on the kill floor.

Q. And what are the two men in the foreground doing?

A. The name of the job is chisel head. Those are to be—quite honest those are hog heads on a spike and as they go [267] around they use that implement in their hand known as a chisel to pry meat and product off the head.

Q. The two men in the foreground, are they wearing gloves on the hands that they are holding their chisels in?

A. No, they are not.

Q. Is that okay on the kill floor?

A. Yes.

Q. And what are they wearing on their other hand?

A. On their other hand they both have on green rubber gloves and one for sure, the one on the right is wearing a white nylon glove.

Q. Why might he have put the white nylon glove over the green rubber glove?

A. Just to help grip the product, convenience.

Q. Is that something that is his choice?

A. Yes.

Q. Now, do you see the individual on the left in the background, he's holding his chisel with a yellow glove on. Is that the cotton glove?

A. It is.

Q. Is it okay that he has chosen to wear a cotton glove on the hand he is holding his chisel in, but the two members in the foreground have not chosen to wear that glove?

A. Yes, it is just personal preference. Sometimes they feel they can get a better grip on the chisel by wearing one of [268] those gloves.

Q. So is the cotton glove required for the chiseler on that hand?

A. No.

Q. The two men in the foreground, are they wearing belly guards?

A. Yes, they are.

Q. If you could point to us where the belly guard is just to show it.

A. It's right here (Indicating) with the strap coming around the back.

Q. Are they wearing any sort of mesh apron?

A. No.

Q. Are they wearing any sort of mesh sleeve?

A. No.

Q. Are they wearing any sort of Kevlar sleeves?

A. No.

Q. Are they wearing plastic aprons?

A. They are not.

Q. And, in fact, the man with the cotton glove in the back that we were talking about earlier, is he wearing a plastic apron?

A. No, he is not.

Q. Is that okay on the kill floor to choose not to wear a plastic apron?

[269] A. It is.

Q. Why can an employee choose to wear a plastic apron if they want to on the kill floor?

A. Just out of convenience, you know, it is going to help keep product off their clothes I mean to be quite honest. With the amount of blood and fluids and liquids up there, it's just going to help keep them drier and less messy.

Q. And is that their choice if they want to wear one?

A. Yes.

Q. I see some individuals in the background who are wearing yellow boots. Do you see that?

A. Yes.

Q. Are those company issued?

A. These may have been and the reason I say that is periodically we will test different types of boots, you know, to see if maybe there's a better one out there and those may have been test boots.

Q. Are those something employees could have worn to and from the plant?

A. Yes.

Q. And just to confirm, I see there's some meat down there in the bottom that is there on the floor. Where does that meat go?

A. What happens is the—any floor product is scooped up by the floor janitor and then it is sent off to rendering to be [270] rendered for various products such as pet food, et cetera.

Q. Is that inedible rendering?

A. It is inedible, yes.

Q. So it doesn't actually go to a human consumer?

A. No, it does not, unless they are feeding it to their dog.

Q. Let's go to 2232-35. Do you know who this lady is?

A. I do. Her name is Teresa Anthony. She works on B cut.

Q. What is she wearing?

A. Teresa has got on her hard hat, she's got on one of the hoodies, she's got her earplugs in, she's wearing a frock, apron, and green rubber gloves.

Q. And what is that that she seems to have attached to her apron?

A. That is a watch clipped—is clipped to her hoodie.

Q. Is she allowed to have a watch clipped to her clothing?

A. Yes.

Q. What can she use that for?

A. Team members typically like to know what time it is, how soon they're, you know, how soon it is to break time or how soon it is before quitting time. They will usually synchronize it with the time clocks so they know exactly when they have to be back from break.

[271] Q. Okay. Let's go to 2232-41.

MS. PASCHAL: Connie, is there any way to clear that mark where we have marked on the photo or is that something we have to do it from the screen?

THE WITNESS: There we go. Got it.

BY MS. PASCHAL:

Q. Thank you, Mr. Sager. Do you know where we are now in the plant?

A. Yes, this is back in the retrim department.

Q. I see the word Cryovac. Are we at the Cryovac machine?

A. Yes, this is another one, yes. You can actually see the vacuum chambers I was talking about earlier.

Q. The man in the foreground, what is he wearing?

A. He's got on his hard hat, hair net, beard net, earplugs, frock, and green rubber gloves.

Q. What about the man behind him standing against the wall, what is he wearing?

A. He is wearing the same thing with the addition of an apron.

Q. Is it his choice to wear that apron?

A. Yes, it is.

Q. And the man in the foreground has chosen not to wear one, is that accurate?

A. Yes, that's correct.

* * * *

[310] Q. You say it is impossible to, keep up with the actual time spent on donning and doffing because people go to the cafeteria and do these various things, sometimes before they go to the locker room, correct?

A. True.

Q. But that is only because you don't have a rule against it, correct?

A. True.

Q. Management has the right to put in a rule that you will—if you want to go to the cafeteria, go there first and then go to the locker room and proceed directly to the production line, doesn't it?

A. It could.

Q. So Tyson is just trying to make it hard, isn't it, by not having a rule?

MS. PASCHAL: Objection. Foundation.

THE COURT: Overruled.

[311] BY MR. WIGGINS:

Q. Isn't it?

THE COURT: Overruled. You can ask him if Tyson is trying to make it hard.

THE WITNESS: I disagree because of the layout of the locker rooms, for example, the various rows of lockers, the time different individuals—individuals would take, it would be totally impossible for a supervisor to visually see and time each individual.

BY MR. WIGGINS:

Q. Okay. We will get to that second difficulty that you just told us about in a second; but let's talk about the first difficulty though. You agree that this question of some people go to the cafeteria first and sit around the cafeteria and may even put on some of their things in the cafeteria, that problem can be solved by a simple rule that says you will not go to the locker room until you are ready to dress and go to the production line, wouldn't it?

A. That is true.

Q. Okay. Now, let's go to the second problem you described. You say that the supervisor couldn't be in the locker room timing people. What are you talking about, stopwatch?

A. I am just even talking visually checking to see if people were physically donning and doffing in the specified time [312] window that you are discussing.

Q. Okay. But the Plaintiffs have never suggested that supervisors try to do this on an eyeball, one person at a time basis, have they?

MS. PASCHAL: Objections. Argumentative and assumes facts not in evidence.

THE COURT: How would he know? Sustained.

BY MR. WIGGINS:

Q. You can simply on your second problem put the time clock at the door of the locker room with the rule I described which is don't go to the locker room till you're ready to dress and go to the line and punch in right there, you now are capturing their time. Management has that power, doesn't it?

A. In theory, yes.

Q. It has seven time clocks at least, doesn't it Tyson at this plant?

A. I believe that is correct, yes.

Q. And Tyson tomorrow or maybe this afternoon could go take one of those clocks or however many it wants and put it at the locker room door and your second problem is solved and you can track the actual time, correct?

A. In theory.

Q. All right. Now, you have a seven-minute rule on clocking in that you have already told us about, don't you?

A. Yes, there is a guideline for that.

[313] Q. Now, you could apply the seven-minute rule by putting the time clock right where we said just in the last question at the locker room door and if someone takes too much time in their donning and doffing, you could flag it when it hit seven minutes and the supervisor could go check it out, couldn't he?

A. In theory, yes.

Q. Just like they do with gang time, correct?

A. Correct.

Q. With gang time the supervisors, every day, are charged with checking all 50 or 60 of their employees on whether they are getting the actual time for gang time, correct?

A. That's true.

Q. And it would be a simple matter, just say okay, check the donning and doffing time too, wouldn't it?

A. Again, in theory, yes.

* * * *

[325] Q. Okay. Now, about 70 percent of your employees of these production hourly jobs are knife-related employees, correct?

A. I believe that's close, yes.

Q. Okay. I heard you say in relationship to some of the pictures, I wrote it down repeatedly, you said that's what they were doing that day. Do you remember those type of caveats you put in there?

A. Yes.

Q. And that is because employees don't do the same job every day, do they?

A. It is not guaranteed, no. They could rotate to different jobs.

Q. You have a rotation program, don't you?

A. For some of the jobs, yes.

Q. An employee can come to work and start on one job and change during the day to another job?

A. That's correct.

Q. By rotation?

A. Yes, that's correct.

[326] Q. And they also can start on one job and then transfer to another job during the day, correct?

A. That is true.

Q. And I can come in and work one job on Monday, it might be knife-related, and come in on Tuesday and work a job that doesn't require a knife, correct?

A. Correct.

* * * *

[345] ELIZABETH T. STOUGH,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: Once you are comfortably seated, I have never seen a courtroom with two microphones before, so I don't know the function of them, but it is kind of neat. Go ahead.

EXAMINATION

BY MR. WIGGINS:

Q. Good afternoon.

A. Good afternoon.

Q. State your name, please.

A. Liz Stough.

Q. And you and I have not met before, I am Bob Wiggins and I am going to try to get you close to being done in 15 minutes. I don't know if I can. Tell us your job.

A. I'm the plant controller of the Storm Lake plant.

Q. And what does that involve?

A. That involves managing the financial side of the plant which means managing payroll, managing expenses, paying producers or paying truckers, those kind of things.

* * * *

[352] Q. Now, you have a seven-minute rule, correct?

[353] A. Yes.

Q. And tell us what the seven-minute rule is.

A. Well, we tell them to not clock in more than seven minutes prior to start time.

* * * *

[354] Q. You will get your gang time if you're on the line at 6:00 and still on the line at 4:00, correct?

A. The gang time is going to be when the line started and [355] when the line ended.

Q. And that's when the first hog comes that starts it and when the last hog goes by you, that ends it, correct?

A. Yes, yes.

Q. Is that what gang time is?

A. Yes.

* * * *

[371] Q. The K-cost—tell us what the K-code cost is.

A. That's the minutes that are given to people doing specific jobs for their—they might refer to as clothes change or additional equipment or whatever that they have to put on.

Q. And that's called pre and post-shift activities, correct?

[372] A. Yes, on the check.

Q. By pre-shift activities it means pre-gang time, correct?

A. Yes.

Q. And by post-shift activities it means after gang time ends and the person steps off the line, right?

A. It is referring to the time that they get done to take off and it is referring to the time that they would put stuff on.

Q. Okay.

A. Prior to working.

Q. And your department has nothing to do with checking or reviewing the time spent on those pre or post-shift activities?

A. No, we don't check those.

Q. And the supervisors and managers out in the departments, they are not responsible for reviewing or checking the actual hours spent on the pre-shift activities or the post-shift activities, are they?

A. I—I don't—I have no idea if they—if they look at that or review that. I haven't asked them. I don't know.

Q. But you do know that the only persons that you have ever come in contact with that assigns the K-code is someone over in the corporate office in Nebraska, correct?

A. I know that somebody developed that and developed how—how many minutes and which jobs it would apply to. That's [373] about all I know.

Q. You know that there is no local review or input into the pre and post-shift pay, correct?

A. Yes, we don't—we don't input that pre and post-shift pay.

Q. You don't review it or approve it, no one at Storm Lake reviews or approves the pre-shift pay or the post-shift pay?

A. We sign that report, it is on that report, so I am—I guess it gets approved; but—

Q. And the reason that no one is checking is because it is just a flat four minutes for a certain period of time and later it might have been raised for some people to as much as eight minutes?

MS. BURKHARDT: Objection. Lacks foundation.

THE COURT: Do you know the answer to that question?

THE WITNESS: Do I need to answer that question?

THE COURT: I said do you know the answer to that question?

THE WITNESS: You would have to repeat the question.

BY MR. WIGGINS:

Q. The reason no one reviews the time on an employee-by-employee basis for actual hours spent on these activities is because you just pay a flat rate?

MS. BURKHARDT: Objection.

[374] THE COURT: Overruled. Answer the question, if you can.

THE WITNESS: Okay. We pay the rate that was designated, that was developed, so depending on the job itself, the job code that was developed, it is something that is fed, we don't see—we don't see anything, we just know it feeds the report.

BY MR. WIGGINS:

Q. When you say we, you mean the Storm Lake people don't have anything to do with it, someone is feeding it over at the corporate office?

A. I'm really referring to my accounting department.

Q. But it is true from an accounting standpoint that the only people involved in inputting or causing the K-code time, the pre and post-shift activity time to be paid is the corporate accounting office?

A. It would be the corporate end.

Q. Where is the corporate accounting office?

A. The corporate accounting office is in Dakota—Dakota Dunes.

Q. And that flat rate that is paid is for pre and post-shift activities is just automatic by job code, correct?

A. Yes, by job code. I do want to add one more thing. When we are talking about—I just want to clarify we are talking about accounting or we're talking about payroll and our [375] payroll department is in Arkansas so—and I do have an accounting department in Dakota Dunes.

* * * *

[386] Q. Do you know of any effort that Tyson has made to determine the administrative practicality of capturing the pre-shift activities and the post-shift activities before and after gang time by a punch clock method?

A. No, I do not.

* * * *

Q. This system that you have described for paying a flat amount of minutes for the activities performed for the company after gang time ends and before it begins you have called K-code, have you experienced any administrative difficulties in tracking or paying

for those minutes every week that you issue the paychecks?

[387] A. I don't have any administrative difficulties. We run through the process like I told you and then—and the check prints and I'm not sure exactly what you're referring to, but I don't know of any administrative problems that I have.

* * * *

[388] Q. I don't mean to suggest to you that it was always four minutes, I recognize that it is in evidence that it later went to as much as seven or eight for some people; but I am talking about the period you had four minutes, that's the lowest amount you paid, I want to deal with that first, you're able to track the day that the employee works or if he's absent and the job that he's on to see if he is eligible that day for payment of the four minutes, correct?

A. I know that I can—my reports show on a daily basis what—what the—the person was here, what job code they were, and that the report—that feeds the report, the number of minutes that he would—he or she would get for that.

Q. And you have told us that there's no administrative difficulty, that the computer is just set up to do it automatically, correct?

A. I don't have any kind of administrative difficulty [389] with it.

* * * *

[393] Q. Let me turn to the page I am talking about. I am talking here about Section 3.7 of this Exhibit 233 called Record Keeping and it says, "Being subject to the FLSA, the company is required to make and keep

records concerning employees' wages, hours, sex, occupations, and other terms and conditions of employment," and you do that, correct?

A. Correct.

Q. That's part of your responsibilities, correct?

A. Yes.

* * * *

[406] DANNY PAUL HACKER JR.,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

[407] EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Hacker.

A. Good morning.

Q. State your full name for us.

A. Danny Paul Hacker Junior.

Q. All right. And are you employed by Tyson?

A. Yes, sir.

Q. How long have you been working at the Storm Lake plant?

A. For 11 years now.

Q. All right. And what is your current job?

A. A cut general supervisor.

Q. Say it again.

A. A cut floor general supervisor.

Q. A cut? Tell us what the cut department is.

A. Cut department is where we make the primal cuts on the carcass.

Q. What is a primal cut?

A. That would be the picnics, butts loin, ham from the carcass of the hog.

Q. And how long have you held that job?

A. I've been in that position for almost two years now.

* * * *

[413] Q. Now, if you would, just so we can sort of speed through this and don't have to spend much time on it, for your—let's take—let me ask this question first: Is there a difference between what the employees in retrim and cut wear in terms of this protective equipment and sanitary gear?

A. Yes, there's a difference on every job.

Q. I realize on a job, but what about between the departments?

A. Each different job has different equipment requirements.

Q. Okay. I guess we will do it department—since you are going to cover two departments, let's do it separate. Will [414] you step down, please, and show us—pick out the items that the retrim department uses, I am not saying every job uses, but someone in the department is using.

THE COURT: Let's get a lapel mic then. Can you get one too, Mr. Wiggins? I don't mind that you move away from the podium, but every time you do, you are a little bit hard to hear.

MR. WIGGINS: Okay.

THE WITNESS: These would be membrane skinner gloves which are used by some of the team members in the department on retrim.

BY MR. WIGGINS:

Q. Lay them up here. We will separate them out.

A. Okay.

Q. For the record that is Exhibit 328.

A. This would be the hair nets, beard nets that are also used by the retrim department.

Q. That's Exhibit 330.

A. Kevlar glove which is used by some team members on the retrim department.

Q. Exhibit 324.

A. Rubber gloves, also used by some team members.

Q. Exhibit 333.

A. Mesh glove used by some team members.

Q. Exhibit 323. The gloves were Exhibit 333, I misspoke, [415] and the mesh is 323.

A. This is the mesh apron which is used by some of the team members in that department also. I don't see a tag on it. The tag fell off.

Q. Exhibit 321.

A. Frock is used by team members, some team members.

Q. Okay. That is Defendant's Exhibit 2001.

A. Belly guard also used by some team members.

Q. That is Plaintiffs' Exhibit 322.

A. Safety glasses which are used by some team members.

Q. Exhibit 339.

A. Rubber apron also used by some team members.

Q. All right. And that's Exhibit 336.

A. Earplugs.

Q. Exhibit 331.

A. Plastic sleeve.

Q. Exhibit 337.

A. Face shield used by some.

Q. Exhibit 340.

A. Cotton gloves.

Q. Exhibit 334.

A. Kevlar glove.

Q. Exhibit 325.

A. Hard hat.

Q. Exhibit 329.

[416] A. Mesh sleeve.

Q. Lost. Fell off. Mesh sleeve, we will have to find the exhibit for that one.

A. Nylon gloves.

Q. Exhibit 335.

A. Hearing protection.

Q. 332.

A. Plexiglass arm guards depending on the job both of those would be used.

Q. 326 and 327.

A. And depending on preference, the rubber boots.

Q. That's Exhibit 338.

A. The only difference for the cut floor is we have some team members that use the rain suits on the cut floor.

Q. All right. So all the items we just listed are used in both the cut and retrim department. The item that would be just for cut is the rain—

A. The rain suit, yes.

Q. All right. The rain suit is 342 for the record. Thank you. Tell us what employees are required to do by Tyson at the moment they step off the line at the end of gang time.

A. Excuse me?

Q. Sure. I will repeat. Tell us what employees in the cut and retrim departments are required to do by Tyson at the moment they step off the line when gang time ends at the end of [417] the day.

A. As they leave the line they go to wash their equipment.

Q. Okay. First thing they do is step off the line and do what?

A. Depending on their preference, some of them start taking off their equipment immediately, some of them wait till they get to the washroom.

Q. First thing they do is have to carry their equipment away from these—the line, correct?

A. If they take it off before they walk away from the line they would be carrying it otherwise they are wearing it.

Q. The employees are not allowed to leave their equipment on the production line, are they?

A. At the end of the day, no, we don't leave the equipment on the production line.

Q. They are allowed to leave some of their equipment right next to the line on hooks and that type of thing at the break period?

A. Yes, sir.

Q. At the end of the day they're required to gather all their equipment up, including their knives and scabbards and all the items you have listed here and take them away from the line, correct?

A. Yes.

[418] Q. They are required to carry that equipment over to the wash station, correct?

A. If they've taken it off, otherwise they would be wearing it, yes.

Q. And they are required to sanitize and wash the company equipment that's not going to be laundered overnight, correct?

A. Yes, the hard equipment, belly guard, knives, scabbard, they rinse those off.

Q. Okay. And when employees step off the line and gather their equipment and transport it over to the wash station, they are on unpaid time as far as gang time goes, correct?

A. That would be after gang, yes.

Q. Okay. Now, let's look at Defendant's Exhibit 2195 which is a video of this washing process and I believe it is in your department, but you will have to tell us. It is Defendant's 2195 is all I know.

MS. BURKHARDT: Is it one that was previously used?

MR. WIGGINS: It is the one I showed in opening statement.

(Defendant's Exhibit Number 2195 was played for the jury.)

* * * *

[420] A. That's a wash area, hoses, basically a big sink.

Q. Do you see the fellow on the left—all right. Back up just a little bit. Watch the fellow on the left. What is he doing?

A. It appears that he is cleaning off his steel.

Q. What is a steel?

A. Steel is a device used to maintain the sharpness of a knife.

Q. All right. And he appears to be using a rubber glove to scrub that steel, is that correct?

A. Yes, it looks like he's wiping it off with the rubber glove.

Q. Let's go ahead and watch him.

A. I was mistaken. He is using a green scratch pad.

Q. Okay. Was that a green scratch pad?

A. Yes.

Q. Where are the scratch pads kept?

A. They keep them in their frock pocket.

Q. What is the purpose of a scratch pad?

A. To help keep the steel clean.

Q. Why do you want the employees to keep the steel clean?

A. They want to keep their steel clean because it enhances their ability to keep the knives sharp which makes their job easier.

* * * *

[422] Q. All right. Now, before we start this up about that equipment that is being shown here in this video, approximately how many employees in the cut department are knife-using employees?

A. I couldn't tell you an exact number off the top of my head. I would say rough guesstimate is that there's something better than 60 percent of them that use knives.

Q. What about in the retrim department?

A. I would have to say just about the same.

Q. All right. Employees rotate around on different jobs from time to time?

A. At times, yes.

Q. Do you have a rotation program that moves employees from job to job for ergonomic reasons?

A. Yes, on certain jobs.

Q. What is ergonomic, what is the ergonomic program?

A. Our ergonomics are fitting our workplace to our team members.

[423] Q. So an employee might start off a shift on a knife job and end up on a non-knife job or vice versa, correct?

A. If necessary, yes.

Q. Let's watch this knife equipment, you said it is a chain, a scabbard, and the knives and the scabbard, let's see what is being done and tell us if this is what the employees are required to do. We are get—we didn't back it up far enough. Now, that's the dipping part, correct?

A. Yes.

Q. Let's go back to where the fellow started with what he is dipping there. Are you going back? I wanted to go back to the fellow that had the scabbard. We advanced it too far. Do you see this fellow on the left? Stop right there. Whoops. See that motion that he just did, he was holding a scabbard out and he was doing something. What was he doing?

A. Rinsing it off.

Q. Is that a bib hose of some kind?

A. Yes, that is a hose.

Q. What is the temperature that is causing all that steam?

A. 140 degree water.

Q. Why do you use that?

A. Helps to get the fat and grease and—off of the equipment.

Q. And is that something Tyson requires the employees to [424] do before they proceed on to the punch clock then to the locker room to store overnight?

A. Before they put it in the locker room, right, they have to wash it off.

Q. They are not allowed to put those items in storage between shifts without them being clean and free of things that might build up contamination, correct?

A. That would be correct.

Q. All right. And what else would this employee, using him as an example, we have seen him hold his belly guard and his scabbard and his knives, his steel up, he washes them, what else would he be washing at this wash station?

A. He has the option to wash off his gloves, his apron, he doesn't have to, he can just put those in his laundry bag, the hard equipment he would have to wash off that doesn't go in the laundry bag. All the other equipment could go in the laundry bag, his rubber apron, all the gloves, sleeves, all that could go in his laundry bag. He wouldn't have to do anything with those as far as rinsing them off.

Q. But you have seen this line of people here and people having to fill in the gaps when they occur, is that a normal occurrence that you have—you have a bunch of people there trying to wash off the end of the shift and have to wait their turn?

A. As people get off the line, they go there and they [425] finish up and leave. As you stated before, we have a rolling start time so as the people at the front of the line get off, they go to the washroom and they are leaving as the people behind them are coming up.

Q. But what we're seeing here when employees—one employee rolls off the wash line, another employee fills in, that's the normal way it works each day, correct?

A. Yes.

Q. Okay.

A. This just—as we're filling our lines.

Q. Let's go ahead. Looks like he's cleaning his boots there, correct?

A. Yes, it appears he rinsed his boots off.

Q. The boots, they don't go in the laundry bag, do they?

A. No, sir.

Q. And the—none of the hard items, including the belly guard, go in the laundry bag, do they?

A. No, sir.

Q. Just for the record, tell us which items do go in the laundry bag from your departments.

A. It would be the frock, all of the gloves, rubber apron, their mesh glove, hair nets if they choose to do so, the Kevlar sleeves.

Q. Anything that is fabric?

A. Any of the fabric items, yes, they can go in there.

[426] Q. None of the mesh items go in there?

A. That would be incorrect. The mesh gloves go in the laundry bag.

Q. Well, they're allowed to go in there or—the mesh glove or is it required to go in the laundry bag?

A. They're allowed to go in there.

Q. But employees are expected by the time they roll off of this wash line that we are seeing in this picture to have gotten themselves scrubbed down in the way we're seeing before they proceed into the locker rooms, correct?

A. Yes—

Q. All right.

A. —they are.

Q. Let's go ahead. Okay. Now, once they dip there at the end, they go—they have to walk on out of the production doors at some point, correct?

A. Yes.

Q. And that's—they go by the punch clock again, correct?

A. Yes, they walk by it.

Q. And they punch out?

A. Not necessarily.

Q. Okay. But, I mean, they're able to punch out right outside the production room door, correct?

A. They are able to, yes.

* * * *

[427] Q. Now, you normally find in your experience, don't you, that at the end of the day people are in a hurry to get home?

A. Yes, that would be true.

Q. And employees are wanting to get through these lines that we are seeing as quickly as possible and get to the locker room and get to the car and get about their business, correct?

A. Yes, that would be true.

Q. But employees are not allowed to leave, they're not free to leave until they've got all the company equipment washed, sanitized, transported to the locker room, the laundry items put in the laundry bag,

the bag pinned, and the pinned bag put into the hamper, correct?

[428] A. Yes, that would be correct.

Q. Until then they are not free to leave, are they?

A. They should do that before they leave.

Q. Okay. All of that is after gang time has ended, correct?

A. Yes, that would be after gang.

Q. Then when they come back in the next morning, they are required to go back to their locker where they left their equipment and to get the equipment out of the locker and get ready to go to the production line before gang time begins, correct?

A. Yes.

Q. And while they might go to the cafeteria if they desire to, they are not required to, are they?

A. They would have to go through the cafeteria to get to the locker room.

Q. But they're not required to do anything other than come from home, get out of their car in the parking lot, come in, and go—they can go straight to the locker room if they want to, correct?

A. Yes, if they choose to do so.

Q. And so the first thing that the company requires employees to do is to go to the locker room and obtain the equipment that the company wants them to carry to the line, correct?

[429] A. No, they have the option if they come in, they can—they will sit in the cafeteria if they want and

have their morning coffee or breakfast prior to going to do that.

Q. I apologize if I didn't make myself clear. What I was trying to ask was the first thing the company requires the employee to do each and every day they come to work is to go to the locker room and get the company's equipment out of the storage?

A. Yes.

Q. Okay. And they are required to unpin the bag—let's get the bag back in the picture. The bag has come back from the laundry room between shifts, correct?

A. Yes, that is correct. It is delivered into their locker.

Q. It is in the employee's locker, correct?

A. Yes.

Q. All the items that were thrown in there were washed together and they are in a jumble, correct?

A. They're in the bag, yes.

Q. They're not hung up for them in the locker piece by piece where you can just take a piece at a time, are they?

A. No, the bag is hung in the locker.

Q. The employee has to get the bag, start taking things out one at a time to get them untangled and he can hang them up in his locker at that point and then proceed to start putting [430] some of them on, correct?

A. Depending on how they choose to put their equipment on. Some people put it on as they take it out of the bag, not everybody pulls it out and hangs it up on the inside of the locker before they put it on.

* * * *

[431] Q. You require your production employees, it is their primary duty to produce uncontaminated meat, isn't that right?

A. I wouldn't say that's their primary duty.

Q. Certainly their duty is not just to produce meat, it is to produce uncontaminated meat, correct?

A. Yes, we would want to do that for the public safety.

Q. Right. And that's one of the—that's the employee's primary duty is to produce a sellable, uncontaminated product, correct?

A. I would disagree with that. Their primary duty is to stay safe.

Q. All right. You can't sell—you've got—you would go out of business if your employees are just sitting around staying safe, right?

A. It would be a balancing act, yes; but primarily they would have their safety as the number one priority.

Q. You can't market and sell that, can you?

A. I don't suppose they can, but I don't think we'd have anybody working for us if they were all hurt.

Q. I understand the point, but I am saying in terms of the company's business, it is in the business of producing and selling wholesome products, correct?

[432] A. Yes.

Q. Wholesome being uncontaminated, correct?

A. Yes.

* * * *

[434] Q. But that is the company policy that you are responsible for applying that employees are supposed to be committed to producing a wholesome, sound product and they can be disciplined and fired if they don't?

A. That would be true.

Q. Okay. Let's go to the Rules in this document that is in evidence, 44 is one of the items that I want to ask you about because it is about this locker we have been talking about. Rule 44. You told me that employees in your two departments, cut and retrim, don't have to take everything out of the bag and [435] hang it up, they can just put it on as it comes out of the bag and I am not disagreeing with you, but this Rule 44 does have some requirements to it of not—let's just read it. "While team members are putting on their equipment, they should leave the rest of their PPE hanging in their lockers and put them on directly from there. Do not lay them on the bench or floor," correct?

A. Yes. If they leave their laundry bag hanging on the hook in their locker, they could take it out of there and put it on.

Q. Okay. All right. That's fine. But the reason for that is to prevent the laundered items from becoming a source of meat contamination, correct?

A. Yes, you wouldn't want to lay your clean frock on the floor.

Q. By the same token you want the employee, once he's done this, that he's directed to do in this Rule 44, once they've got that equipment, their sanitary gear on, their frock is on and their hair net and beard net and that type of thing, you want them to keep it free

of contamination while they get to the line to start using it, correct?

A. Yes.

* * * *

[439] Q. But you would agree the biggest departments at the plant in terms of hourly production employees are your two departments that you work in, cut and retrim, correct?

A. The two combined, yes.

Q. And what you have been telling us about here this morning and will continue to tell us as we go along covers those 920 employees, correct?

A. Depending on the job, yes.

Q. Okay. And all 920 employees in cut and retrim are [440] required to wear the white frock except the janitors, correct?

A. That would be correct.

Q. How many janitors?

A. I believe we've got—it varies depending on what we have going on, it could be from—anywhere from three to five on the cut floor and two to three on the retrim side.

Q. Okay. So well over 900 employees on any given day in cut and retrim are required to wear the frock, correct?

A. Yes.

Q. Required to wear the hair net, correct?

A. Yes.

Q. Required to wear the beard net if they have facial hair, correct?

A. Yes, if they have facial hair.

Q. Required to wear the hard hat?

A. Yes.

* * * *

[446] [Q.] Employees, when they come in in the morning, may start on one job and end up on another job on the same shift, correct?

A. Yes, that is true.

Q. And that's because sometimes people don't show up for work or get sick while they're at work or for various needs you have to move people around to keep your line running, correct?

A. Yes, that would be correct.

Q. And you have the right to move employees from their assigned job or their owned job to another job as needed, correct?

A. Yes.

Q. In fact, you can do it on a momentary basis or you can actually transfer them temporarily to another job, correct?

A. For the day, yes.

Q. And you have already told us about your rotation program, correct?

A. Yes.

Q. And an employee can work double shifts sometimes, [447] correct?

A. Yes, people—

Q. That's another way of filling in—I am sorry, I overspoke on top of you. What were you saying?

A. Yes, people do work overtime at the plant.

Q. And one form of that is a double shift, same day, you work two shifts, correct?

A. Yes.

Q. And that's to fill in gaps with—that are caused by missing people, correct?

A. Yes.

Q. And employees may have to work a double on a different job than they worked on their regular shift, correct?

A. If they choose to do so, yes.

Q. All right. So an employee during a part of the day may be a knife—on a knife job and another part of the same workday be on a non-knife job, correct?

A. Yes, that would be correct.

* * * *

[457] Q. Look at page 48, line 16, question, "You would agree that Tyson Foods is in the business of processing and providing a safe, uncontaminated, finished pork product for sale to the [458] public, are you not?" Answer, "That would be part of our core values, yes."

"Is that the main business that you're in, providing safe, uncontaminated finished pork product for sale at this facility?" Answer, "That's our primary business, yes." Do you agree with that?

A. Yes, that is what I said.

Q. Okay.

A. Cutting meat is our primary business. I wouldn't say that we would do that to the—where we would

blow off the safety of our team members and do that at no cost; but yes, that is the business that we are in is to cut meat.

Q. Not in the business of cutting meat, you are in the business of cutting safe, wholesome, uncontaminated meat, correct?

A. Yes, we would want that to be safe, yes.

* * * *

[473] Q. Do employees have to sanitize their equipment as they walk in in the morning?

A. Yes, ma'am.

* * * *

[487] Q. Does the Storm Lake plant have a rule about how long before an employee's scheduled start time they are supposed to clock in?

A. Yes, we have a policy they should not punch in more than seven minutes before their start time.

* * * *

[493] Q. And at the end of the shift might employees have switched jobs, might they change jobs during the day?

A. Yes, that happens quite often.

* * * *

[497] Q. Does the amount of time it takes an employee to don their PPE and standard items vary based on the number of items being worn?

A. Yes.

Q. So in your experience could it take an employee who [498] wears more items a little bit longer than an employee who wears less items to don those items?

A. Yes, ma'am.

Q. There were some questions earlier about what employees are allowed to wear. Are employees allowed to wear optional equipment?

A. Yes, ma'am.

Q. Are they allowed to wear additional items that are not required by the company?

A. Yes, ma'am.

Q. And if an employee does a job that doesn't require rubber gloves, would the employee be permitted to ask for a pair of rubber gloves if they wanted to wear them?

A. Yes, ma'am.

Q. If employees choose to wear optional items, might it take them a little bit longer to put on their equipment and standard items than somebody who wears only the required items?

A. Yes, ma'am.

Q. I think you mentioned earlier, what—what was the temperature on the cold side?

A. We keep the room at approximately 45 degrees.

Q. Do some employees choose to come to the plant with a sweater or sweatshirt to wear?

A. Yes, ma'am.

Q. Do some employees carry those in from home?

[499] A. Yes, ma'am.

Q. And do some employees put those on in the locker room?

A. Yes, ma'am.

Q. In your experience why would an employee bring a sweatshirt or a sweater with them and put it on before work?

A. If they wanted to wear it for comfort, if it is summertime and it is hot outside, obviously don't want to wear a sweatshirt when it is 95 degrees out, carry it and put it on when you get into the plant.

Q. If an employee chose to do that, to bring a sweatshirt and put it on in the locker room while they are putting on all of their other items, would it take that person a little bit longer to get dressed than somebody who doesn't choose to bring a sweater or sweatshirt to put on?

A. Yes, ma'am.

* * * *

[501] Q. You mentioned earlier in response to a question that some employees wear their required items or their optional items that they choose to wear under their frock and some team members might wear those same items on the outside of their frock. Do you remember that testimony?

A. Yes, ma'am.

Q. Is that just a matter of choice whether they wear it inside or outside?

A. It is a matter of the personal preference.

Q. The items that employees wear on the outside of the frock, do they have to take those off before they go to break?

A. Yes, ma'am.

Q. The employees that wear items on the inside of the frock, are they allowed to keep those on when they go to break?

A. Yes, ma'am.

[502] Q. The employees who take off the items on the outside of their frock, does it take them maybe a little bit longer to get their items off and leave the floor than somebody who puts all their items under their frock?

A. Of course. If you wore your mesh sleeve, mesh apron on the outside of the frock, it would take that much longer to get that off than if you didn't have to take that off.

Q. Is that taking longer because of the employee's choice to wear the items on the outside as opposed to the inside?

A. Yes, that would be their choice.

MS. BURKHARDT: If we could pull up Plaintiffs' Exhibit 301 which was admitted yesterday I believe.

Q. All right. Mr. Hacker, this is a document that was admitted into evidence yesterday. Do you recognize it as a list of the required knife-related items that are required for certain positions within the plant?

A. Yeah, it looks like a requirement of safety equipment that's required to be worn for each job.

MS. BURKHARDT: Connie, if you could scroll down.

Q. You let us know when we get to the positions that look like the processing side jobs.

A. You are starting right there at department 721.

MS. BURKHARDT: Thank you, Connie.

Q. So, Mr. Hacker, do the positions that are now shown on the screen look like processing side job positions to you?

[503] A. Yes, these would be jobs that are performed on the cut floor.

Q. And how do you know that?

A. I know the—what the positions are for what it says on the thing, department numbers tell me what department they are in.

Q. And are you familiar generally with the department numbers for the processing floor jobs?

A. Yes, ma'am.

Q. Are you familiar generally with the names of the different positions on the processing floor?

A. Yes, ma'am.

Q. Is that true for both the cut and the retrim?

A. Yes, ma'am.

Q. All right. If you would look at the first row across the top, the one that lists out the equipment, do you see that?

A. Yes, ma'am.

Q. Are those items certain items that might be worn by employees on the cut or retrim floor?

A. Yes, ma'am, some of them are.

Q. Which ones would not be?

A. I don't believe that we have anybody that wears shin guards or a knocker vest, that would be the first column and the next to the last column.

Q. Do you have employees on the processing side who wear [504] legging aprons?

A. No, that also. Column F

Q. Do you understand what the different notations, the numbers in the boxes on this chart represent?

A. Yes, it appears to denote how many of that particular piece of equipment they're required to wear.

Q. And are you generally familiar from your personal knowledge with the equipment that is required for the different positions on the processing side?

A. Yes, ma'am.

Q. If you had a question or needed to test your memory, how would you do that?

A. I would pull up the JSA to see what is required for the particular job.

Q. And what is a JSA?

A. Job Safety Analysis, shows the required safety equipment and a rough outline of the job and what safety points there are for it.

Q. If you could take a look at the job on line 122, the trim butts supreme lean position. Do you see that?

A. Yes.

Q. Is that a job on the processing side?

A. Yes, that would be a job on the cut floor.

Q. Can you tell us what items are required for this position?

[505] A. By this list there's one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one—that should be Plexiglass arm guard.

Q. And in your experience does that sound right in terms of the items that are required for that position?

A. Yes, ma'am, that sounds correct.

Q. If you look at the positions that are up on the screen, do you see other positions that required a belly guard?

A. Yes, ma'am.

Q. Can you give us some examples of some of the other positions that require a belly guard in addition to the trim butts supreme lean position?

A. Right above that, raised neck bones, right below it, rob neck bones.

Q. The raised neck bones, and you said the raw neck bones?

A. Rob next bones.

Q. Rob neck bones. Okay. Are there positions that do not require the belly guard?

A. Yes.

Q. Can you give us some examples of those?

A. Right above and below it, skin butts and box multi-vac butts.

Q. If you look again at the trim butts supreme lean position, you see the number two in the Polar sleeve column?

[506] A. Yes, ma'am.

Q. What does that indicate to you?

A. That they would wear a Polar sleeve on each arm.

Q. Are there other positions that wear a Polar sleeve on both arms on the processing side?

A. Yes, ma'am.

Q. Can you give us some examples?

A. Rob neck bones would be one, looks like rob lean from fat back would be another.

Q. Are there some positions on the processing side that might only wear one Polar sleeve?

A. Yes, ma'am.

Q. Can you give us some examples of those?

A. Raise neck bones.

Q. Are there some jobs on the processing side that don't wear any or not required to wear any Polar sleeves?

A. Yes, ma'am.

Q. Can you give us some examples of those?

A. Operate butt picnic saw, skin butts, box multi-vac butts again.

Q. All right. If we could take a look at the position at line 126, it is the pack feet tails position.

A. Yes, ma'am.

Q. You see that job?

A. Yes, ma'am.

[507] Q. What items are required, what of these safety—knife-related safety items are required to be worn in that position?

A. None.

Q. And how do you know that?

A. There's nothing denoted in any of the boxes for it.

Q. So is it true then that some positions on the processing side wear certain items while other positions might wear no knife-related items?

A. That would be true, yes.

Q. Let's look at one more job, if we could look at line 139, the reject butcher. What does the reject butcher do?

A. Reject butcher takes care of any product that falls on the floor or becomes contaminated, that's an abscess, grease, whatever the case may be, and trims or cleans that to our specifications.

Q. Now, if you look at the reject butcher position, what items are required to be worn in that position? What knife-related safety items are required to be worn in that position?

A. It would be one mesh apron, one scabbard, one steel, one mesh glove, one Polar sleeve, and one mesh sleeve.

Q. Based on your experience does that sound like an accurate list of items required for that position?

A. Yes, ma'am, that would be correct.

[508] Q. The reject butcher wears one mesh apron. Do you see any other employees listed on the page we have up who also wear a mesh apron?

A. Yes, ma'am, raised neck bones.

Q. Also wears a mesh apron?

A. Yes. Excuse me. No, wrong thing. Mesh apron, no. Mesh sleeve, yes. I looked at the wrong column. Sorry about that.

Q. That's okay. Is it true that some employees on the processing side wear a mesh apron while others do not?

A. Yes, that would be true.

Q. Looking at the three positions that we have looked at, is it accurate that what an employee wears in terms of the knife-related safety items will vary from job to job?

A. Yes, ma'am.

Q. And in your experience out on the floor based on what you personally observe, is that true that employees will wear different items depending on the job?

A. Yes, ma'am.

Q. Is it true some employees wear some items that other employees do not?

A. Yes, very true.

Q. And are some employees required to wear no items while other employees are required to wear a few items?

A. Yes.

* * * *

[510] Q. Mr. Hacker, in looking at this Plaintiffs' Exhibit 301, is it—does this demonstrate that certain employees are required to wear certain items for their positions?

A. Yes, ma'am.

Q. And in addition to the items that are shown here, in addition to these knife-related safety items, some employees [511] wear standard items like a hard

hat or a frock, they would be required to wear certain of those types of items as well, right?

A. Yes, ma'am.

Q. If an item is not required to be worn for a job, so if it is not listed on the JSA or it is not one of those items that everybody has to wear like a hard hat or the frock, can an employee perform that job with just those items?

A. Yes, they would be able to perform it.

Q. If an employee wanted to wear or use an optional item in addition to the things that are required, we would allow them to do that, right?

A. Yes, ma'am.

Q. But an employee wouldn't necessarily need those items that they are choosing to use, those optional items in order to technically perform that job, right?

MR. WIGGINS: They are leading too much. We object.

THE COURT: Sustained.

BY MS. BURKHARDT:

Q. Would an employee be able to perform—technically perform their job without the optional items they choose to wear?

A. Yes, ma'am.

* * * *

[533] Q. Employees are not allowed to touch the meat, handle the meat with their bare hands, are they?

A. They should be wearing gloves if they are handling the meat.

* * * *

[545] DANIEL ARNOLD LINDGREN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning.

A. Morning.

Q. State your full name, please.

A. Daniel Arnold Lindgren.

Q. And what is your job at Tyson?

A. I'm the general supervisor on the cut floor.

Q. And how long have you been a general supervisor on the cut floor?

A. Since about August of 2008.

[546] Q. How long have you worked at the Storm Lake plant?

A. I started December 9, 2003.

Q. And have you ever worked in the meat packing industry before?

A. No.

Q. All right. And how long have you held your current job? I may have asked you that.

A. As a general supervisor?

Q. General.

A. I believe it was about August 2008.

Q. August?

A. 2008.

Q. Eight. Who did you replace?

A. Kris Jiminez.

Q. Kris Jiminez?

A. Yes.

Q. All right. You and I have never met before, but your deposition was taken by some other lawyers, correct?

A. Correct.

Q. As—what were you before a general supervisor?

A. For just about a year before that I was a front-line supervisor on the cut floor.

Q. You are going real fast and I am not hearing.

A. For about a year before that I was a front-line supervisor on the cut floor. Prior to that I was a front-line [547] supervisor on the kill.

Q. How long were you in the kill department?

A. About three and a half years.

Q. So you have knowledge of both the cut department and the kill department, correct?

A. Correct.

Q. As a supervisor were you responsible for daily review of the gang time to make sure everybody got their—their full amount of time that they worked?

A. I was responsible for documenting gang time, yes.

Q. All right. And is that known as the editing process in the T and A system?

A. No, the gang time gets inputted on the daily report whether it is cut, kill, or retrim and the supervisor goes through the previous day's hours to make sure everybody got paid accordingly.

Q. Everybody got paid for the full actual hours they worked, correct?

A. For the gang time plus any hours they had before or after shift.

Q. And those would be hours before or after shift on setup or teardown, correct?

A. Scheduled setup or teardown time, yes.

* * * *

[549] Q. Except for that management support person that is paid punch to punch, everybody else is on gang time under you, correct?

A. I have right now six supervisors that work for me, everybody that they manage is on gang time.

Q. Now, the minimum amount of equipment that employees under you use are the boots, the aprons, the hard hats, the gloves, earplugs, and the frock, correct?

A. Not entirely. Boots—well, over-the-ankle approved work shoes, hard hat, and earplugs are the only things that are required.

Q. But I'm saying the employees under you, it is minimum, the least they wear are the boots, the aprons, the hard hats, the gloves, earplugs, the frocks, hair nets, and beard nets, correct?

[550] A. That would vary by position. They don't necessarily wear—

Q. I am talking about the positions that have the least equipment. This is a question you were asked in your deposition. Do you remember?

A. Yeah, I think it says further in my deposition I went back and corrected that statement. Not everybody wears all that equipment. My manifester, the management support person wears hard hat, earplugs, boots.

Q. I understand not everyone, that's why I asked the minimum, the least that your employees wear, I want to stick with that, okay? I want to talk about the least equipment that anybody wears. It doesn't mean everybody wears it, just the least that anybody wears, okay? Didn't you answer in your deposition that it was the boots, the aprons, the hard hats, the gloves, earplugs, the frock, and the hair net and the beard net?

A. Initially in my deposition that's what I said, yes.

Q. Were you wrong?

A. I may have overstated a couple of people. Mule drivers probably have the least amount of equipment out of anybody. They would wear over-the-ankle work boots, hard hat, earplugs, and safety vest.

Q. What does a mule driver do?

A. Drives a mule.

Q. Is that a live animal mule?

[551] A. No, it is a motorized pallet jack.

Q. And what is he driving that—what is he transporting on that?

A. Combos of product.

Q. I didn't catch the word. What?

A. Combos of product.

Q. Combos?

A. Yes.

Q. What is a combo?

A. It is a cardboard box with plastic liner that weighs about 2,000 pounds when it is full.

Q. So he is not handling meat, correct?

A. They do handle some.

Q. Is it packaged meat?

A. No, it is raw materials. They move product to make weight in combos.

Q. Is that a job someone can own?

A. Yes.

Q. How many mule drivers do you have?

A. Presently I have nine.

Q. When you answered in your deposition that the minimum, the lowest—least equipment that employees wear in the department, I know you corrected it with a mule driver, put that aside, when you answered in your deposition the minimum was the boots, the apron, the hard hats, the gloves, the earplugs, the [552] frock, and hair net and beard net, what jobs were you talking about?

A. A person wearing that product—or that configuration of equipment would probably be a ham chop or shoulder chop operator.

Q. Ham job?

A. Ham chop, shoulder chop.

Q. Shoulder chop.

A. There's a couple others.

Q. All those ham chops, shoulder chops, and couple others, how many employees are we talking about?

A. Between those two jobs there's four.

Q. There's four in the ham chop and shoulder chop?

A. Two each, total of four.

Q. These other ones you can't remember the names of, can you give us an idea what jobs those are?

A. Those are pretty much all non-knife jobs.

Q. Okay.

A. Ham chop, shoulder chop, trim bone, hind hook sides, I mean, there's—there's quite a list of jobs that don't require anything.

Q. Do you know how many employees are in those jobs?

A. Off the top of my head probably 14, 15. Excuse me. Probably 18.

Q. So would you agree that the vast majority of your [553] employees are in knife jobs?

A. Yes.

Q. Give me your percentage that is your best estimate of the percentage of employees under you that are in knife jobs.

A. Including Whizard blade?

Q. Yes.

A. 70 percent.

Q. Okay. By the way, I don't think I have asked you yet, how many employees are under you?

A. Fluctuates back and forth between 220, 230.

Q. And that is in your current job as general supervisor, correct?

A. Correct.

Q. How many did you have when you were the front-line supervisor cut department?

A. The main break I had 19.

Q. How many were under you as a front-line supervisor in kill?

A. Anywhere from 19 to 45. I worked all the different departments on the kill.

Q. You said between 19 and 45?

A. Yeah. Largest department on the kill floor is I think 45 people.

Q. Okay. You would agree, would you not, that these various sanitary steps or items or equipment that Tyson has and [554] requires, that the primary benefit from those is to be able to roduce a safe, wholesome, uncontaminated meat product, correct?

A. That is a benefit of wearing the equipment. Our top priority is always safety.

Q. But you said in your deposition it was—that the primary benefit of that was to enable Tyson to produce a safe, wholesome, uncontaminated product, correct?

A. That would be the company's benefit of it.

* * * *

Q. Page 76, line 23. I will ask the question—I will read the question and you read your answers. Quote, "Do you—" question, "Do you agree with the statement that Tyson is in the [555] business to produce a safe,

uncontaminated, finished pork product? Would you agree with that statement?" And your answer?

A. "Yes, that's what we're in the business to do."

Q. Question, "And as part of your supervisor managerial duties, part of your responsibility is to make sure that Tyson's employees are complying with good manufacturing practices which are established by Tyson and the USDA and to the extent that certain of your customers have additional good manufacturing practices, it is your responsibility to make sure that they're complying with all those, correct?"

A. "Yes, that's correct."

Q. Question, "Likewise, it is part of your job to make sure that all the tools or items that they utilize in this work are free of contamination such as knives, steels, belly guards, et cetera. These are to be maintained in an uncontaminated fashion during the work they are utilizing it, is that correct?"

A. "Yup, still accurate."

* * * *

[556] Q. Question, "If employees don't maintain their working tools or protective equipment in a sanitary manner, they can be subject to discipline, is that correct?"

A. "That's correct."

Q. "The reason they would be subject to discipline is because its primary concern and primary benefit for Tyson Foods is that they produce a completely uncontaminated product available to the public." Read your answer. Wasn't it your answer—I am quoting—"The primary concern for any consumer that the product is free of contamination."

Question, "And that's Tyson's primary concern?" Answer, "That's our primary goal to produce—" correct?

A. Yes. It appears part of my answer is cut off there too.

* * * *

[557] NICOLAS LOVAN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: When you are comfortably seated there, pull the microphone a little closer to you. Great. Thank you very much. Go ahead, Mr. Doolittle.

MR. DOOLITTLE: Thank you, Your Honor.

[558] EXAMINATION

MR. DOOLITTLE:

Q. Good afternoon. Would you state your name and introduce yourself the jury, please?

A. I am Nicolas Lovan.

* * * *

Q. And where are you currently employed?

A. Tyson Foods.

Q. Is that the Tyson plant in Storm Lake that is the subject of this lawsuit?

A. Yes, sir.

[559] Q. All right. How long have you been employed with Tyson in Storm Lake?

A. 28 years.

Q. Okay. And do you remember the day when you were hired and went to work for Tyson?

A. May 10, 1983.

Q. Have you worked continuously since then?

A. Yes, sir.

Q. Okay. Did you recently have a change in your job classification?

A. Yes.

Q. Okay. Let's focus on the period of time from March 2004 up until approximately June of last year. During that period of time what was your job and what was your classification?

A. Utility man on ham line.

* * * *

[561] Q. And as best as you can, I would like you to tell the ladies and gentlemen of the jury what those items, that ensemble that you don and doff on a daily basis, if you can go by the list, go down the list of what you put on every morning.

MR. SAPP: Your Honor, no objection. Can we have clarification as to which job position counsel is referring to?

MR. DOOLITTLE: I'm sorry. I'm sorry. That's fair. His classification is a utility man, Your Honor, and that would be utility man on the ham line retrim on the day shift.

THE WITNESS: Okay. I have hard hat, hair net, earplugs, white frock, cotton glove, two of them, rubber glove, mesh glove, mesh sleeve, Kevlar sleeve, belly guard, a steel-toed boots, safety glasses, and safety glasses, yes.

BY MR. DOOLITTLE:

Q. Anything else?

A. Scabbard, chain, and steel.

Q. Are those the—I'm sorry.

A. Knife too. Knife.

Q. Okay. Are those the items that you are required to don and doff every day?

A. Yes, sir.

* * * *

[567] Q. Okay. Please continue.

A. After I put my lunch box on the shelf, I continue walking to my locker and then I open the lock, unlock the padlock, open the door, grab my laundry bag, unpin it, and put it on the hook. After that I take the jacket which I have in the locker or sweater, put it on, zip it up, and then take the cotton glove from open laundry bag, put in my non-knife hand, and then the rubber glove and then the mesh sleeve and then mesh glove.

After that I grab the Kevlar sleeve, put on my right arm, knife arm, cotton glove, rubber glove, and I get the boots inside the locker out, take my tennis shoe off, put in the locker, and then after that I take the white frock, put it on, button it up. After that I take the hair net which I hang on the hook, put it on. Beside that is my hard hat, I put the hard hat on and the earplug on.

After I done I grab the chain with the knife and steel, put it on my shoulder, hang it on my shoulder, belly guard, hang it on my shoulder because I don't want to put it on yet. I have to stop at a dip tank so I

hang it on my arm. And then I check over if I have all my equipment on.

Oh, one last thing, safety glasses. I take the safety glasses, put inside my frock pocket and then I look around, see if I have everything, and after that I shut the locker door and start walking to the punch clock.

[568] Q. That was my next question. Do you do all these activities that you described before you punch that clock?

A. Yes, sir.

Q. All right. And so then you start walking from the—from the locker room and where do you go from there?

A. From the locker room I go to hallway to the punch clock.

Q. Is the punch clock located between the—where you walk out of the locker room and your work area, is it located on the way?

A. The punch clock located on the way to the dip tank and the locker room.

Q. Okay. So what do you do when you get to the dip tank?

A. I take the belly—the knife, scabbard with the chain and the steel and belly guard, dip it in the tank and my mesh glove, dip it in the tank.

MR. DOOLITTLE: May I be relieved from the podium for one second, Your Honor?

THE COURT: You don't need to ask permission.

BY MR. DOOLITTLE:

Q. Mr. Lovan, I have just handed you Plaintiffs' Exhibit 322. Could you tell us what that is?

A. This is the belly guard.

Q. Is that the type of belly guard that you are required to dip in the sanitizing solution tank before you go into the [569] work area every day?

A. Yes, sir.

Q. After you—tell us again what all do you dip in the tank, the dip tank, what all do you dip in there besides the belly guard?

A. Chain with scabbard and knife and the mesh glove.

Q. You are talking about a chain, what kind of chain is this and what is it utilized for?

A. It is a link chain that you hook the scabbard and the steel onto.

Q. Is that worn around your waist throughout the day?

A. Yes, sir.

Q. And how many knives do you have?

A. Two knives.

Q. And where are those knives and scabbard kept? Are they in the locker at the beginning of the day?

A. Yes, in the locker, yes.

Q. After dipping the scabbard and the mesh and the steel and belly guard in the tank, where do you proceed then?

A. And then I walk to my work station.

Q. What do you do when you get to your work station?

A. When I get to the—to my work station, I am steeling the knife waiting for the ham to come.

Q. I think you testified that your particular line time was about 6:17?

[570] A. 6:17, yes.

Q. Do you normally try to arrive before 6:17?

A. Yes, sir.

Q. Okay. Can you estimate for me approximately how long it takes you from the time you open your locker and retrieve your items out of your bag, your personal protective equipment, your sanitary items out of the bag, from that point in time until you get to your work station, this would include walking and dipping and to your work station, approximately how many minutes does that take you?

A. Eight to nine minutes.

Q. Let me ask you this: What—what do you base that on?

A. Well, from doing it every day for the past 28 years. It is my routine.

Q. Okay. Well, that is another question. Does your routine normally change or is it the same or—

A. It's the same.

Q. And you said you have done that for 28 years?

A. Yes, sir.

* * * *

[590] Q. All right. And what do you do at the end of the day?

A. At the end—

Q. Before you can—before you can leave the line and leave the plant and go home, what do you do?

A. At 2:47 the last piece of ham get to my station. I trim that piece then I get off the work station to the washroom.

Q. Approximately how far is it from—from your station on the line where the last piece of ham passes you, how far is that from where you go to the wash station? Approximately how far is that?

A. Approximately 30 second to a minute walk.

Q. Walk?

[591] A. To walk.

Q. When you get there, what kind of an apparatus do you have in front of you to—where you do your washing?

A. When I get there there's a lot of people, worker that try to wash their equipment too so sometime I have to wait in line to get to the hose.

Q. Do you have to wait in line every day?

A. Most of every day.

Q. Okay. Now, how many—at this period of time, approximately how many people are getting off at this period of time?

A. Sometime we have loin line that get done same time that we do so when loin line get done it is pretty crowded.

Q. Okay. Does the loin line—does the loin line, do those folks get off at the same time as the ham line that you work on in retrim?

A. They get off pretty, you know, two to three minute maybe, you know, prior to our time.

Q. And how many folks work on that loin line?

A. I say about 100, 110.

Q. And how many folks work on the retrim ham line that you work on?

A. I say about 80.

Q. That's, my remedial math which I am terrible at, that's about 190 people, does that sound about right?

[592] A. That sounds about right.

Q. And does that 190 people, do they all utilize the same wash area?

A. Yes, same wash area.

Q. Do you know how many—and what do you use to wash up with there? Are there hoses, brushes, what do you use?

A. We have a hose, first I go there, I take my belly guard off and then my chain with scabbard, knife, and steel, hang it on the hook, hose it down really good, and then I hose my mesh glove to get it clean. That's about it.

Q. Now, is the water that you are using to clean up with, is this water hot or cold or—

A. It's hot.

Q. How hot is it?

A. Oh, I don't exactly know. About, you know, over 100 degree.

Q. And how many—how many—you said there was about 190 people that utilize this wash area. How many hoses are there? Do you know?

A. I say about 50.

Q. 15?

A. 50.

Q. 15?

A. Not teen, 50.

THE COURT: 50.

[593] THE WITNESS: 50.

BY MR. DOOLITTLE:

Q. 5-0?

A. 5-0, yes.

Q. For 200 people or 190 people?

A. Yes.

Q. Now, how long does it take you to wash this equipment that you have just described for the jury in the afternoon, how long does that take?

A. I'd say about two minutes.

Q. Okay. And then how long does it take you to walk from there back to the locker room?

A. About one minute.

Q. Okay. And when you get to the locker room, tell the ladies and gentlemen of the jury what your routine is in the locker room.

A. Okay. After I get to the locker room—

Q. Let me ask you one question. I don't mean to interrupt you. After you wash your equipment down that you have described, is there anything you do between that wash station and the locker room?

A. Okay. After I wash it down, I grab my belly guard and chain with steel and scabbard, knife to the dip tank and I dip my equipment, mesh glove. After I dip that, I go through the door, take a left to the punch card.

[594] Q. All right.

A. And then I walk straight to locker room.

Q. All right. What do you do when you get to the locker room?

A. After I get to the locker room, open the padlock, open the door, and I start taking my equipment off, first hanging my belly guard on the hook inside the locker, second hang the knife, chain, scabbard on the hook in the locker, and I take my hard hat, my hair net, earplugs off, hang in the locker.

After that I take my white frock off, take the laundry bag out, put the white frock in the bag, rubber glove, both hand, put it in the bag, mesh glove first, mesh glove before rubber glove, mesh glove first, and I take it off, hang it in the locker, and after that I take a rubber glove off, put it in the laundry bag, and then cotton glove, put it in the laundry bag.

After that I take the mesh—mesh sleeve, unhook the mesh sleeve from the front, swing it to the back, snap it out, pull it out and hang it in the locker. Pinch the clip on mesh sleeve—Kevlar sleeve on my right-hand side, pull it down, put it in the laundry bag. Take my jacket or sweater and unzip it, pull it out, and then put it in the laundry bag to be washed.

After that I take my tennis shoe out from the locker and take my boots off, put on the tennis shoe, put my boots back in the locker, and I check if I am missing anything, double [595] check, and then if everything in

the locker, I shut it, grab the dirty laundry bag, throw it in the basket, and head to the cafeteria.

Q. All right. When during the day do you get your punch card back from your wife?

A. During break time.

Q. Is that on your lunch break?

A. Yes.

Q. Is that unpaid lunch break?

A. Yes.

Q. All right. Do you ever stop and socialize in the locker room at the end of the day?

A. Normally I don't do that.

Q. Okay. Do you ever take any equipment home at the end of the day?

A. No, sir.

Q. From the time—from the time the last ham passes in front of you, approximately how long does it take you to walk from your station on the line to where you wash and sanitize this equipment that you have described, to the punch clock where you punch out, to the locker room where you store your personal protective and sanitary equipment, until the time you have completed putting the stuff in the laundry bag that Tyson furnishes you and put it in the—is it a hamper, a dirty clothes hamper, is that what it is?

[596] A. Yes.

Q. Until the time you place that bag in that hamper, approximately how many minutes does that take you based upon your routine?

A. I say about nine to 10 minutes.

* * * *

[597] Q. Yesterday, Mr. Lovan, as I understood it, you estimated your total time from the time you say you open your locker to when you usually arrive at your usual work station was a total of about eight to nine minutes, correct?

A. Yes, sir.

Q. I will find it here in a minute on the walk time as to what your estimate was yesterday from walking from the locker to your work station; but as I look for that, even if you think you estimated a minute to the dip tank, it is only about 30 seconds from the dip tank to your work station, correct?

A. Yeah, approximately, yeah.

Q. So I am just trying to be accurate and fair in understanding what you told us yesterday that even if you count [598] the dip tank—if you are saying it is 30 seconds from the dip tank to your station and it is a minute from the locker to the dip tank, can we agree that your best estimate, and I realize it is an estimate, of walking from the locker to your work station is about not more than a minute and a half roughly, is that fair, sir?

A. Yeah, something like that, if you don't have a lot of people line up, yes, at the dip tank.

Q. So what I am trying to understand is that if your estimate of your total time for doing everything, putting on the items you have described for us and walking from the locker to your work station is eight to nine minutes, of that eight to nine minutes, approximately perhaps six to seven of those minutes are the time that you are actually putting on your items, fair?

A. Sounds fair.

Q. You agree with that, sir?

A. Yes.

Q. Okay. Now, three of the items that you have told us that you put on are a hard hat, the hair net, and boots, correct?

A. Yes.

Q. I realize the item I am holding is not your own hard hat. You have your own hard hat at Tyson, correct?

A. Yes, sir.

[599] Q. And it is adjusted to fit your head, correct?

A. Yes.

Q. And obviously you have put that hard hat on hundreds if not thousands of times in the time you worked at the company, correct?

A. Correct.

Q. And I am holding Defendant's Exhibit 2006. Do you agree that this appears to be similar to the type of hard hat you wear with an adjustable strap in it?

A. Yes.

Q. Okay. Now, I am not going to ask you to put it on, Mr. Lovan, but can we agree that in terms of the time it takes you to put your hard hat on, we are talking two seconds, couple seconds. Do you agree with that?

A. Yeah, just slip it on.

Q. Okay.

A. And there's an earplug, you have to, you know—

Q. You have them strapped in your helmet?

A. Yes.

Q. They are already hanging there and you put your earplugs in?

A. Yes.

Q. That's a couple seconds, can we agree? You put on your hair net, something similar to what I am holding here?

A. Yes.

[600] Q. Correct? Defendant's Exhibit 2003 is an example. It just has an elastic fold on it and you put it on your head, right?

A. Yes, just—yeah, cover everything, you know.

Q. And we can agree that just takes two seconds or so, fair?

A. Yes.

Q. Okay. Are the boots that you put on boots issued by Tyson?

A. Yes, rubber boots.

Q. I am holding in my hand a sample, these are marked I think Defendant's Exhibit 2011, rubber steel-toed boots. Are these similar to the boots you put on every day?

A. Yes, sir.

Q. And can we agree that putting on your boots takes perhaps 10 seconds?

A. You know, sometime I have to put the socks on, my socks and take my tennis shoes off and put the—yeah—the boots in, you know, it seems a little bit longer.

Q. Not more than 30 seconds, can we agree with that?

A. Okay. Yes.

Q. All right. So in terms of the items I just reviewed, just the hard hat, the hair net, the earplugs, and your boots, those—to put those on takes well under one minute, doesn't it?

[601] A. Yeah, pretty close.

Q. So out of the six or—six to eight minutes that are actually involved in putting on your equipment or your items in the locker room, less than a minute of that is the hard hat, hair net, earplugs, and boots, the rest of it is then the protective items and your frock, is that fair?

A. My frock, yes.

Q. Okay. Now, you were asked about your lunch break. Do you remember that?

A. Yes, sir.

Q. Now, at your lunch break you have told us you take off everything except your hard hat, your hair net, and your boots, that's correct?

A. Correct.

Q. And then you go to lunch?

A. Yes, sir.

Q. And then when you come back to lunch—from lunch rather, you put all of your items back on, that is your mesh sleeve, your mesh glove, your two cotton gloves, your rubber glove, your frock, your belly guard, your Kevlar sleeve?

A. Yes, sir.

Q. And your knife belt with your knives?

A. Yes, sir.

Q. All of those items, correct?

A. Correct.

[602] Q. And yesterday you were asked by your lawyer how long it takes you to put the items back on after you come back from lunch and your testimony was that it takes you approximately two minutes.

A. Yes, sir.

Q. Can you explain for me, Mr. Lovan, how it takes you six to seven minutes to put on the same items before your shift that you put on in two minutes after you come back from lunch?

MR. DOOLITTLE: Objection, Your Honor. That mischaracterizes his testimony. That is not what he said.

THE COURT: Overruled. Answer the question, sir.

BY MR. SAPP:

Q. Do you remember the question, Mr. Lovan?

A. The reason, you know, I have my boots and everything on before and then there's a crowded, you know, when people come back from the lunch at the same time and then it kind of take you more time to grab stuff because the hook is side by side, about six inches apart, so you grab one thing and put it on and then another person grab their stuff so it slow you down.

Q. And that—but I think we understand each other, but even with that, you told us yesterday you put everything back on after lunch in two minutes, right?

A. Yes, sir.

Q. And because we've eliminated the hair net, hard hat, and the boots as we have already discussed, you told me earlier [603] it takes you six to seven minutes to put all those things on at the beginning of your shift, right?

A. Right. Another thing, when, you know, I taking off the stuff too, it might slow me down too because of the crowded, a lot of people.

Q. At lunch?

A. Yes.

Q. Within that two minutes, correct?

A. Yeah.

Q. Okay. Mr. Lovan, the reason I ask that is if, in fact, you put on the items that we've described, your mesh sleeve, your mesh gloves, all your gloves, your Kevlar, your frock, in two minutes, is it fair that one of the reasons it might take you six to seven minutes to put those on at the beginning of your shift is Tyson has no rule, does it, that requires you to put your items on in a particular time in the locker room in the morning, does it?

A. No rule.

Q. There's no one in the locker room monitoring you and saying Nicolas, you must put on these items in two and a half minutes or anything like that, is there?

A. No.

Q. You can put on the items that you wear at your job in whatever time you feel it needs to put them on correctly, right?

A. Yes, as long as I get to the work station on time.

[604] Q. Exactly. And you can put on your items in any order you want to put them on, correct, there's no rule about what you have to put on first, is there?

A. No, no rule.

* * * *

[605] Q. Now, you have described for the jury and for me the items that you put on in addition to the hard hat, the hair net, the earplugs, and your boots. I want to just follow up on a couple questions in that regard.

First of all, I would like to establish, Mr. Lovan, you have told the jury your position is classified as a utility person, correct?

[606] A. On the ham line, yes.

Q. On the ham line. The job that you have done most often, however, in the ham line is what is called bone hams, correct?

A. Yes, sir.

Q. And the bone hams job that you do most often is a position in which you use a knife, true?

A. Yes, sir.

Q. Is that correct? And you have told us yesterday I think I heard you say that all of the items that you described, you wear a mesh sleeve, correct?

A. Yes.

Q. A Kevlar sleeve?

A. Yes, sir.

Q. On your right arm?

A. On my right arm.

Q. Yes. A mesh glove, correct?

A. Mesh glove.

Q. On your left hand?

A. On my left.

Q. You wear two cotton gloves?

A. Yes.

Q. You wear one rubber glove or two?

A. Two rubber gloves.

Q. Two rubber gloves. Your frock?

[607] A. Yes, sir.

Q. A belly guard?

A. Yes.

Q. And a knife scabbard or chain with your scabbard—excuse me, with your knives and your steel on them, correct?

A. Correct.

Q. All right. And I think I heard you say yesterday, I want to clarify, do you—is it your testimony that all of the items you describe are required for your job?

A. Yes, sir.

Q. Have you ever seen or did anyone review with you when you started your work at Tyson what is called a JSA, a Job Safety Analysis that goes over the equipment you are required to wear for your position?

A. They never show me when I start this position.

Q. Have you ever seen the JSA for your position?

A. I never have.

Q. Has it been your observation, sir, that in all the years that you have worked at this plant, and particularly the last few years that you have worked for Tyson, that there are a lot of production workers who may wear items for comfort or convenience that are not required by their position? Do you agree with that?

A. Yes.

MR. SAPP: At this point, Your Honor, I would like to [608] move into evidence, it is a Plaintiffs' exhibit, it is Plaintiffs' Exhibit 239-36 and any Defendant objection that was made to that exhibit is withdrawn. It is the JSA for the bone hams position of Mr. Lovan.

MR. DOOLITTLE: Your Honor, to the extent that—we would object to the extent that the witness has testified he's never seen such a document and this document reflects no signature, just a blank sheet of paper, he has already testified he's never seen this document, no one has ever presented him with this document, and obviously he has no knowledge of it. It is not his document. It has not been presented to him and bears no signature.

MR. SAPP: It is a Plaintiffs' exhibit, Your Honor.

THE COURT: 239-36 is received. The question concerning personal knowledge is a different question.

MR. DOOLITTLE: Thank you.

BY MR. SAPP:

Q. Mr. Lovan, if you think back, isn't it correct on your knife hand at least you are not required to wear a cotton glove or rubber glove on your knife hand?

A. No, not required.

Q. But you choose to wear a cotton glove and a rubber glove on your knife hand, correct?

A. I choose to wear because of sanitation and to get me a good grip for the knife handle.

[609] Q. The—to clarify, I think it is obvious, the items that you have described as the belly guard and your knife belt and scabbard, I think the jury knows this, but we don't have it for security reasons in the courthouse, your knife belt is a chain that goes around your waist and has a simple fastener on it, correct?

A. Yes, it go around.

Q. And that's something that you have taken on and put—taken off and put on hundreds of if not thousands of times, correct?

A. Yes, sir.

Q. And it is fair to say that item, it takes you one to two seconds to take that belt off and put it on, correct?

A. Approximately, yes, sir.

Q. And I think we have the belly guard.

MR. SAPP: Do you have the belly guard?

Q. The belly guard which is already in evidence is Plaintiffs' Exhibit 322. I just want to—you do agree that the strap on this belly guard and this plastic clip that clips in and out, correct?

A. Yes, it snap in.

Q. The way you put it on is you put the clip in front, snap it, it is on, and you turn it around so the belly guard covers your front, correct?

A. Yes.

[610] Q. We can agree to do that takes just a few seconds, doesn't it?

A. Yes.

Q. And you talked about dipping after your shift and before your shift. You carry your knife belt and your scabbard and your belly guard on your shoulder or your arm and you just dip it in the tank, that's what dipping is, that takes a second or two, is that fair?

A. Just to dip in the tank, yes.

Q. And you can put your belly guard on and your knife chain belt, you can fasten those as you continue to walk to your station, correct?

A. I prefer not to do that.

Q. You do it when you get to your station?

A. I do it to my station.

Q. Okay. Thank you. Now, the bone hams position that we talked about is not the only position that you have performed in the ham line, correct?

A. Yes, sir.

Q. You do some other jobs there, right?

A. Yes, sir.

Q. And one of the jobs you do is membrane skinner, is that correct?

A. Correct.

Q. As a membrane skinner you don't use a knife, correct?

[611] A. I don't use a knife.

Q. Do you wear a different combination of items when you do the membrane skinner job where you don't use a knife?

A. Yes.

Q. So some of the protective equipment that you wear when you do your bone hams job you don't wear when you do the membrane skinner job, right?

A. Right.

Q. So based on even in your own personal situation, Mr. Lovan, it is fair to say that different positions within the ham line call for different combination of safety or sanitary items depending on the position. Do you agree with that?

A. Yes.

Q. Okay. And that's been your observation of other persons that you have seen over the years working in your department, true, they wear different combinations of items depending on their job?

A. Yes, sir.

Q. All right. Did I—to clarify one thing, Mr. Lovan, when you were talking yesterday about what you put on in the locker room at the beginning of your shift and the order in which you put those things on, you put on the frock after you had already put on the mesh sleeve, the Kevlar arm guard, correct, you put the frock on after those, don't you?

A. I put the frock on after the—I put the mesh sleeve [612] on and the Kevlar sleeve on.

Q. The frock covers the mesh is my point, correct?

A. Yes.

Q. And as a result of the fact that the frock covers the mesh, you don't have to wash the mesh after your shift, do you, you just put it in the laundry bag?

A. Yes, put on the laundry—my mesh I don't put in the laundry bag. I just hang it.

Q. You just hang it without washing it because it is under the frock?

A. Yeah.

* * * *

[613] Q. In your own observation, Mr. Lovan, because you have been there at the plant so long, it is fair to say from your own observation that different employees put on their items and take them off at different speeds than other employees, don't they?

A. Yes, sir.

Q. All right. And to your knowledge there is no rule at [614] Tyson that requires you to put on any one of your items in any specific time, is there?

A. No.

* * * *

[615] Q. Okay. And to clarify, you talked with your counsel about the end of your shift. At the end of your shift as utility man, you wash off your equipment with one of the 50 hoses that you have told us about, correct?

A. Correct.

Q. Those are fairly high-power hoses, correct?

A. Correct.

Q. And you carry your knife and your scabbard and your steel on the knife chain and you spray that, correct?

A. Correct.

Q. And your belly guard that we have talked about, you unclip that and you spray that with the hose, is that correct?

A. Belly guard, yes.

Q. Okay. And then you told us it takes about 30 seconds to walk from your work station to that washroom, correct?

A. Correct.

Q. And I think we agreed earlier based on the time that you took to walk from the locker to your work station, the [616] remainder of your walk to the locker room would be less than a minute, wouldn't it?

A. From the—

Q. From the wash station to the locker room, isn't it?

A. About a minute or so, yes.

MR. DOOLITTLE: I'm sorry, I didn't hear the witness.

THE COURT: What was your answer, sir?

THE WITNESS: Yes, about a minute or so to walk from the dip tank to the locker.

BY MR. SAPP:

Q. I didn't want to leave out anything, you dip your items on the way off the floor as well, correct?

A. Yes, sir.

Q. That's just the one or two second dip in the dip tank is what we are talking about there, correct?

A. Yes, sir.

* * * *

[624] Q. At the lunch break—strike that. In the morning when you get there, what do you have on when you walk in the locker room? Do you have any of your equipment on when you walk in the locker room that morning?

A. I don't have.

Q. You've got your clothes and your tennis shoes?

A. Yes, sir.

Q. And where is this equipment stored? What do you have to do? Tell the jury again what you have to do in the morning when you get to your locker.

A. All my equipment is stored in the locker and then I have to get everything out from the locker and put it on.

Q. Okay. As a matter of fact, there's a lock on the locker that you have to unlock before you can even get to it, is that not right?

A. Right.

Q. Okay. Is the locker room crowded in the morning?

A. Yes, it's crowded.

Q. Are you the only person in that locker room?

[625] A. No, sir.

Q. Do you ever have to wait for a place to sit down?

A. Yes, sir.

Q. And at lunch you don't take off your boots?

A. No, sir.

Q. You don't take off your tennis shoes?

A. No, sir.

Q. You don't change socks?

A. No, sir.

Q. You don't do any of that at lunch?

MR. SAPP: Your Honor, this is leading and suggestive.

MR. DOOLITTLE: It is leading. I withdraw the question.

Q. Do you take off any of that stuff at lunch? Do you take your boots off at lunch?

A. No, sir.

Q. Do you change socks at lunch?

A. No, sir.

* * * *

[629] JESUS C. BALDERAS,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

THE COURT: When you are comfortably seated there, make sure the microphone is pulled fairly close to your mouth there. Thank you.

EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Balderas.

A. Good morning.

Q. Can you please state your name for the record?

A. Jesus C. Balderas.

[630] Q. Sir, where do you live?

A. I live in Storm Lake, Iowa.

Q. Are you currently employed?

A. That's correct.

Q. Who is your current employer, sir?

A. Tyson Fresh Meats.

Q. And where do you work, what city do you work for Tyson in?

A. That's in Storm Lake, Iowa.

* * * *

[632] Q. For the jury, can you briefly describe your job duties as the shoulder chop—in the shoulder chop position?

A. I cut the—I align the carcass and there's a laser light which I pull—either pull or push the hog to be separated from the carcass from the shoulder and that is called—it goes through a saw, circular saw to separate the carcass from the shoulder like I said.

Q. In your position on your shift, okay, are there any other employees performing that same job that you are aware of?

A. No, sir, I'm the only one.

Q. In terms of the shoulder chop position, are you required to wear any personal protective equipment?

A. Yes, I do.

Q. In terms of the shoulder chop position, are you required to wear any sanitary items?

A. That's correct.

[633] Q. In your position can you please tell the jury the items of personal protective equipment and the sanitary items that you are required to wear?

A. That's correct. That would be rubber boots with steel toe, weight belt, hard hat, earplugs, safety glasses,

hair net and beard net, Kevlar sleeves, belly guard, frock, plastic and cotton gloves.

Q. With respect to the belly guard, have you worn that a long time?

A. I began the use of belly guard I would say for a year and a half.

Q. And what did you wear, if anything, prior to wearing the belly guard?

A. I used to wear an apron, a plastic apron.

Q. And why did you change?

A. There's a metal finger right where I work and it was—it was bothering me on one side of my leg and I change from the apron to a belly—a belly guard because of that.

Q. Was that permitted by the company?

A. Yes, it was.

Q. Now, how long have you worn safety glasses?

A. I have worn safety glasses for I would say like a year—a year and a half.

Q. Why did you start wearing safety glasses?

A. I start wearing the safety glasses because I got some [634] kind of an infection in my eye. I probably got a piece of fat or a chip of bone into my left eye and I got an infection. They told me that I should start wearing safety glasses.

Q. Who told you that?

A. They took me to the office and say well, what was the problem, and I said I probably got something

in my eye and the safety person along with my supervisor, they would agree that I should start wearing safety glasses from now on.

Q. You mentioned Kevlar sleeves. Do you wear a Kevlar sleeve on both arms or one arm?

A. That's correct, on both arms.

Q. On both arms? I didn't hear the answer.

A. Both arms, that's correct.

Q. Thank you. Do you recall who told you that you were required to wear the personal protective equipment and sanitary items in the shoulder chop position?

A. There's—before you start doing a job they have a paper that they go through, they start telling you what are the items required to do that job and that's where it says you have to use certain items.

* * * *

[638] Q. Okay. So you arrive at your locker and what is the first thing that you do, sir?

A. I open up my locker and I start dressing up.

Q. Okay. Now, I want to talk about this process of dressing up. Can you describe for the jury the order in which you put on your personal protective equipment and sanitary items and the first thing you do to the last thing that you do?

A. Okay. I get to my locker, open it up, I start—I put my boots first, then I put my weight belt, then I put my sweater on. After that I wear bandana around my head, I put my beard net, hair net, my hard hat, safety glasses, and then I open up my laundry bag and I put my frock, my Kevlar sleeves, after that I put my

gloves, plastic and cotton gloves inside my pockets, grab my belly guard, and that's about it.

Q. As part of this lawsuit are you claiming pay for the sweater or the bandana that you put on?

A. No.

Q. Okay. Are those items that you could put on at home?

A. Yes, sir.

Q. And why do you wear a sweater to work or at work rather?

A. Since I work in the cold side of the plant, I must [639] wear a sweater.

Q. Once you have completed the process that you just described, what do you do next after you get your equipment on?

A. I go and if—I go to the cafeteria and wait for the time.

Q. Okay. What do you do in the cafeteria?

A. Well, I sit there until they open up the doors to go in there.

Q. How long do you typically spend in the cafeteria before you go to work or your work station rather?

A. I would say around seven minutes.

Q. Okay. Now, when you leave the cafeteria, where do you go?

A. I go straight and sanitize my hands—punch in first, sanitize my hands, and then go to the washroom.

Q. And the punch clock that you punch in, where is that located?

A. It is located in the cafeteria.

Q. Okay. And where is the wash station located?

A. It's located next to the cafeteria on your way—on your way in to the cut floor.

Q. Okay. And what items, it any, do you dip?

A. I only dip belly guard.

Q. On a typical day when you're dipping the belly guard, are there any other employees doing similar activities?

[640] A. Yes, sir.

Q. On a typical day can you approximate how many other employees are dipping items?

A. Well, all of them. You mean ahead of me?

Q. Yeah, how many—how many employees typically are ahead of you in line?

A. Probably three or four.

Q. Okay. Approximately how long before the first piece of meat arrives in your work station do you get to your work station?

A. I get there around three minutes before the first piece comes.

Q. Okay. Now, during those three minutes do you do anything?

A. I have to start on the saw, open up water, and check, see if the light where I—the laser light where I align the carcass is in the right place. That's the supervisor's job, but I just want to make sure it's in place. There's some metal sheets that cover the table and I need to make sure that they're in place also.

Q. At this point do you have anything on your hands?

A. After doing that I put my cotton and plastic gloves on.

Q. And at this point have you put on your belly guard?

A. That's correct.

[641] Q. When do you put on your belly guard?

A. What was that again?

Q. When do you put on your belly guard?

A. Before the first piece comes.

Q. Okay. Now, the process that you just described, you arrive at your locker, putting on your equipment, going to the cafeteria, then going to your work station, have there been occasions when you have not gone to the cafeteria?

A. Well, of course. Yes. There have been occasions.

Q. All right. And under what circumstances would you not go to the cafeteria?

A. Sometimes I run late, sometimes I think I am going to be late to the line.

Q. Does the line start if you are late, whether or not you are there?

A. Well, it starts, yeah.

Q. Okay. Now, on those occasions when you don't go to the cafeteria, the process of opening your locker, putting on your equipment, walking to the floor, sanitizing your hands, dipping your belly guard, and arriving at your work station, can you approximate for the jury how long that process takes you?

A. I would estimate around 10 to 12 minutes.

Q. And what is your estimate based upon?

A. I mean, I been doing this for 12 years already. I think that that would be my best estimate.

* * * *

[645] Q. Now, once the last piece of meat has come by your station, what is the first thing that you do at the end of the day?

A. At the end of the day when the last piece goes by I make sure the saw is off along with the water, I go straight to the washroom.

Q. Now, how far is your work station from the washroom?

A. Exactly I don't know, but it's about—I would say around 30 yards from my work area.

Q. Okay. And approximately how long does it take you then to walk from your work station to the wash area?

A. I will say around 30 to 40 seconds.

Q. Okay. Typically are there other people there when you arrive at the washroom?

A. Yes, they are.

Q. Okay. And what happens if you're not the first person there to wash your equipment?

A. I have to wait.

Q. Okay. When it is your turn, what is the first thing that you do?

A. I wash my boots with soap, water.

Q. What is the next thing that you do?

A. I wash my belly guard, my glove, plastic gloves, also my hard hat.

Q. Do you wash your hard hat every day?

[646] A. Not every day, but every two or three days I do.

Q. Approximately how long does that process of cleaning those items take you?

A. I will say around two to three minutes.

* * * *

[647] Q. Now, after you have completed washing your equipment, what do you do next?

A. I go to—I go punch out and then go to my locker room.

Q. Okay. When you arrive at the locker room, can you describe the process of what the first thing you do is to the last thing that you do before you leave for the jury?

A. I open up my locker again, grab the laundry bag, take off my boot first, then I take my frock and—my belly guard first, my frock, Kevlar sleeves, plastic gloves, cotton gloves, then I put my beard net and hair net inside the hard hat along with my bandana and earplugs, take off my safety glasses, and that's about it.

Q. Okay. And you mention that you put some items in your laundry bag. How do you close your laundry bag?

A. We have a pin to close it.

Q. After you close the laundry bag and the items are in, where do you put the laundry bag?

A. There's a basket right in the corner of the locker room where we have to throw the laundry bags there.

Q. Okay. Once you have thrown your laundry bag in the basket, what do you do?

[648] A. I go ahead and go to the cafeteria and ready to leave.

Q. What time does the last piece of meat arrive at your work station?

A. That would be 2:30 in the afternoon.

Q. Now, the process that we just went through from the line stopping, you going to wash your equipment, punching out, going to the locker room and take off your equipment, tossing the laundry bag in the basket, can you estimate approximately how long that process takes you?

A. My best estimate would be from eight to 10 minutes.

Q. And what do you base that estimate on?

A. It's based on the time that I have done it. I mean, I have done this for years.

Q. At the end of your workday when you are taking off your equipment, do you typically stop and socialize on either the production floor or in the locker room?

A. No, I don't.

MR. SMITH: Thank you, Mr. Balderas. One of the company's attorneys is now going to ask you some questions.

THE COURT: Mr. Sapp?

EXAMINATION

BY MR. SAPP:

Q. Mr. Balderas.

A. Hi, how are you?

Q. Good morning.

[649] A. Good morning.

Q. Good to see you again.

A. Good to see you again too.

Q. I know you don't mean that, but you should. Just a few questions for you, sir. You've told your counsel and confirmed to the jury that your job is shoulder chop on the cut floor and you are the only person who does that job, am I right?

A. That's correct.

Q. And in describing the items that you wear every day for the jury, I believe in response to a question from counsel you indicated all those items were required except for your sweater and your bandana. Do you remember that?

A. That's correct.

Q. Now, you mentioned when counsel asked you a question about how do you know they were required or however it was he asked you, you said well, there was a paper when you had an orientation. Do you remember that?

A. That's correct.

Q. Have you heard of the term JSA or Job Safety Analysis that lists the required equipment for each position at Tyson?

A. That's correct.

MR. SAPP: Your Honor, I believe this is in evidence already, but I want to confirm. It is a Plaintiffs' exhibit, it is Plaintiffs' Exhibit 71, the JSA for the shoulder chop position in department 721.

[650] THE COURT: Is it in?

MR. MUELLER: It is an A exhibit.

THE COURT: Category A exhibit, it is received. It is not already in.

MR. SAPP: Would you publish it?

Q. Mr. Balderas, if you look on your screen there, sir, to your right.

A. Sorry about that.

Q. That's okay. I can't figure them out either. Can you read that okay, sir?

A. That's correct.

Q. All right. And just to cover a couple quick things, at the top this says Storm Lake, Job, Shoulder Chop, and it gives a number and the department number, correct?

A. That's correct, sir.

Q. This is your job?

A. That's correct, sir.

Q. And do you see where it says Safety Equipment Required?

A. That's correct.

Q. And it has Hard Hat and that's checked, correct?

A. That's correct.

Q. And it has Earplugs or Muffs and that's checked?

A. That's correct.

Q. And then it has Safety Glasses and that's checked, [651] correct?

A. Correct.

Q. Do you see anywhere under safety items required Kevlar sleeve?

A. No, I don't, sir.

Q. You choose to wear a Kevlar sleeve, correct?

A. That's correct.

Q. It is possible under Storm Lake's policies, Tyson's policies, if you want to wear something that is safety related, you are free to wear that even if it is not on your job safety required equipment. Do you agree with that?

A. That's correct, sir.

Q. Okay.

MR. SAPP: Your Honor, I want to clarify and present another exhibit, it is not yet marked, it is technically for impeachment purposes, if I may. I am going to show a copy to counsel and I am going to have the witness describe it before asking to move its admission and show it to the jury.

THE COURT: Okay.

MR. SAPP: May I approach, Your Honor?

THE COURT: Yes. You don't have to ask permission.

BY MR. SAPP:

Q. Mr. Balderas, I am going to hand you another exhibit. I have had it marked Defendant's 2253 at the bottom. Before I move for its admission, I will ask you to identify it. Does [652] this also say at the top it is a Shoulder Chop Job Safety Analysis just like the one we just looked at?

A. That's correct.

Q. This one though which is a Defendant's exhibit, down at the bottom this actually has your signature on it at the bottom, doesn't it?

A. That's correct.

Q. Okay. And at the top, I won't ask you to read the items yet, in looking at the three items that are checked at the top, this has an additional item that wasn't on the last one, doesn't it?

A. That's correct.

MR. SAPP: Your Honor, I move the admission of Defendant's Exhibit 2253 and we will also state for the record the original will show there's a blanked out area which contains some personal identifying information of the witness and it is blanked out so we aren't in violation of any rules of the court.

MR. SMITH: No objection.

THE COURT: Received.

MR. SAPP: Can we publish this?

Q. I am going to give—I am going to switch copies with you, Mr. Balderas, because this one—I blanked out your Social Security number for you. Okay? I don't want to put that in the public record.

Now, I have displayed up on the screen there a copy of [653] this Exhibit 2253 and I just want to clarify for the jury. This is the—a similar document as we have already described, correct?

A. Correct.

Q. I am going to move this up and show the jury. This one contains your signature there at the bottom left, doesn't it?

A. That's correct.

Q. And this one actually has some other signatures, the safety director, shows others that reviewed this by their signatures, correct?

A. Correct.

Q. And dates, correct?

A. Correct.

Q. This one at the top shows one more item that did get added and that's the weight belt, correct?

A. Correct.

Q. And there is no belly guard listed on this required equipment, correct?

A. That's correct.

Q. But in fairness you have explained to the jury why you now choose to wear a belly guard, that you developed a little irritation on one side of your leg because of your work table, is that correct?

A. That's correct.

[654] Q. All right. And no one at Tyson prevents you from wearing an additional item for your comfort or convenience just because it is not listed on the JSA, do they? Do you agree with that?

A. Yeah, I agree.

Q. All right. Thank you, sir. I am done with that. I will take that back from you. Mr. Balderas, you have been asked by your counsel to give some time estimates concerning the time it takes you to put on things, take things off, correct?

A. Correct.

Q. And these are questions you have been asked before in this case, correct—

A. Correct.

Q. —to give estimates. And first of all, we can agree the estimates that you have given are just that, they are your best estimates, correct?

A. Correct.

Q. You have never timed any of the activities you have been asked about, have you?

A. I have never timed myself.

Q. It is just your best effort to estimate the time, correct?

A. Correct.

Q. And I am not being critical, I am just asking this question: Do you think, Mr. Balderas, it is possible when you [655] were asked a question without being actually there and putting it on, you may have overestimated the time of putting on some of your items?

A. No, I don't.

Q. Let me give you an example. I am holding up in front of the jury Defendant's Exhibit 2006, it is a Tyson hard hat. Do you see that?

A. Yes, sir.

Q. And this is—I am happy to have you look at it, this is like the hard hat you wear every day at your job, isn't it?

A. That's correct.

Q. It has an adjustable strap inside, correct?

A. Correct.

Q. Obviously the hard hat you have, it may belong to the company technically, but it is your hard hat to wear, you own it, don't you have?

A. Yes, sir, I do.

Q. Your hard hat is adjusted to fit your head over your bandana and that is something you control, right?

A. That's correct.

Q. Now, having—looking at the hard hat that I am now holding, if I asked you, Mr. Balderas, how long do you think it takes you to put on the hard hat, would you agree you can put this hard hat on in two or three seconds, would that be fair?

A. That would be fair, that's right.

[656] Q. Okay. Maybe five, but definitely less than 10 seconds?

A. Sometimes the strap goes all the way up and you have to adjust it; but that's sometimes.

Q. But just a few seconds?

A. A few seconds probably, yeah.

Q. Now, do you agree when you were asked at your deposition how long you thought it took and how long you estimated it took to put on your hard hat, you stated at that time you thought it was 30 seconds?

A. I said that, yeah.

Q. I am not being critical, but just now that you see the hard hat and think about it and look at what is involved in putting it on, 30 seconds was probably a pretty high estimate, wasn't it?

A. I consider taking it out of the locker room, out of the locker, I was—that's what I meant by 30 seconds, taking it out of the locker, putting it on, adjust it, I would say 30 seconds, sir.

Q. One of the other items that you have been asked about is steel-toed boots, correct?

A. That's correct.

Q. And I know there are different kinds, but I am holding in my hand what the jury has seen before already, it is a pair of boots that's marked Defendant's Exhibit 2011. I will hold [657] them out in front of you, rubber boots, steel toes, are those like the boots you put on every day?

A. Those are exactly the boots that I wear.

Q. They have no straps, no buckles, no ties, they just slip onto your feet?

A. Yes they do.

Q. I am not going to have you do it here, but looking at the boots, would you agree probably to put on these two boots would take you 30 seconds or less?

A. To put them on it takes—yeah, more time considering that you have to sit, fold your pants, fixing them, and put them on.

Q. But it takes less than 60 seconds, can we agree with that?

A. I will say more than that.

Q. You testified at your deposition that you believed that it takes you three minutes to put on your boots?

A. I said I would think two minutes and a half to three minutes, yeah.

Q. You don't think a three-minute estimate is way too high for putting on a pair of boots?

A. Like I couldn't—I have to take them out of the locker, sit myself down, fold my pants, and put the boots on.

Q. You wear a hair net and a beard net, correct?

A. That's correct.

[658] Q. Yours may be larger because you have a beard, but it is something like I am holding in my hand here, isn't it, Defendant's Exhibit 2003?

A. That is exactly what I wear, that's correct.

Q. You agree you can put your hair net and beard net on in less than 10 seconds?

A. I would say more than that.

Q. 20 seconds?

A. Probably 20 seconds, that's correct.

Q. In any event, at your deposition did you tell us you thought it would take you one minute to put on your hair net?

A. I would—did I say that one minute? That would take me 40 to a minute, yeah.

Q. So you don't think one minute is a little too high on your estimate to put on a hair net?

A. Well, you have to put that beard net—you have to adjust the beard net right to the mouth. You don't

want to have it all over your nose and your cheeks and whatever. You have to adjust it to your face and then you have to cover your ears, cover your bandana with the hair net, and I would say that would take a minute or it could be 40 seconds. Like I said, I haven't timed myself, but that's my best estimate.

Q. One of the items that you have—the jury is already aware that you and everyone wears is a frock, a white coat that goes over your clothing, correct?

[659] A. Correct.

Q. This is one of the items that you take out of your laundry bag when you start to dress in the morning, isn't it?

A. That's correct.

Q. The company launders this frock for you every night, you have a clean frock to put on over your outer clothing every morning, don't you?

A. That's correct.

Q. And one of the steps that you have talked about in answering your counsel's question is that you have to take the frock, the items out of your laundry bag, correct?

A. Correct.

Q. Now, to take your frock out of your laundry bag to get ready to put it on, can we agree that would be 10 seconds?

A. To take it out of the bag?

Q. Yes.

A. Just to take it out of the bag?

Q. Yes.

A. That would be around, yeah, 10 seconds, 15 seconds.

Q. And again, I am not being critical, I am just trying to get to how certain you are of your estimates that you base your claims on in this case, sir. Did you tell me at your deposition that you thought it took you three minutes to take your frock out of your laundry bag? Do you remember that?

A. I didn't say to take it out of the laundry bag. That [660] means take it out of the laundry bag and putting it on.

Q. Okay. Do you recall—

MR. SAPP: Counsel, this is page 31, lines 24 and 25 and the top of page 32.

Q. Let me ask you, Mr. Balderas, if you remember being asked this question and giving this answer and I will be happy to show it to you, sir.

A. Okay.

Q. Question, "How long do you think it takes you to take the frock out of the laundry bag?" Answer, "I would say taking it down from the hanger and opening it up and taking it out, I would say around three minutes."

Question, "Three minutes?" Answer, "Yeah."

Do you remember giving that answer?

A. That's correct.

Q. Do you still believe it takes you three minutes now that we've focused on it to take the frock out of the laundry bag?

A. No, sir.

Q. I am not going to go through all the items, Mr. Balderas. I am simply trying to see if we can agree that when you're asked to estimate time in the abstract like at a deposition, it is very possible that your time estimates can be high, would you agree with that?

A. I agree with that.

* * * *

[668] DONALD BROWN,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

MR. DOOLITTLE: May I inquire, Your Honor?

THE COURT: Yes. Go ahead.

EXAMINATION

BY MR. DOOLITTLE:

Q. Would you introduce yourself to the jury, please?

[669] A. Donald Brown.

* * * *

Q. Where are you currently employed?

A. Tyson Foods in Storm Lake.

Q. And can you tell the jury when you went to work there approximately?

A. 5-20 of '08.

Q. Does that come up to about three and a half years?

A. Yeah, three and a half.

Q. Prior to going to work at—at the Storm Lake facility, Tyson Foods, have you worked in the meat packing industry before?

A. Yes.

Q. About how long have you worked in this industry?

A. About 30 years.

Q. Could you just describe some of the jobs that you have worked in so the jury will know your background?

[670] A. Sanitation, production, on the kill floors, manifester on the loading dock, variable jobs throughout the plant.

Q. All right. How many jobs have you held for Tyson?

A. Just one.

Q. And I'm sorry, tell me again, what was your date of hire?

A. 5-20 '08.

Q. Okay. What was that job that you hired into in May of '08 with Tyson?

A. Split saw.

Q. And for the benefit of the jury, what is a split saw?

A. It's where you split the carcass in half.

Q. Is that vertically or horizontally?

A. Yeah, it's vertical.

Q. It is like—

A. Up and down.

Q. And what do you accomplish this with?

A. Big saw with an 18-inch blade.

Q. When you say big saw, how big is it?

A. Probably weighs about 200 pounds.

Q. 18-inch, is that a round blade or long blade?

A. Circular blade.

Q. Do you know about how fast this blade turns?

A. Just an educated guess, probably 3,000 to 4,000 RPM's.

Q. What shift do you work on?

[671] A. I work on the second shift.

Q. Is that also called the B shift?

A. Yes.

Q. Do you know if that has a department number?

A. Yes.

Q. And what is that department number?

A. 913.

Q. Okay. Now, the jury has heard for the last several days about a kill side or fab or cut side. What side of the plant is it that you work on?

A. I work on the kill side.

Q. What grade is that 913 classification?

A. My particular job is grade four.

Q. The hogs, how do these hogs get to you so that you split them? Is it a chain or a line that these hogs are on? Explain to the jury how that all works.

A. Yeah, the hogs are fed into the kill floor on chains.

Q. All right. And they come past you?

A. Yes.

Q. Okay. And at what speed, if you know, do these hogs come past you?

A. The splitters, we're doing about 17 hogs a minute.

Q. Okay. Are you required to wear any personal protective equipment or sanitary equipment? Does the company have any requirements for this particular job as a hog splitter [672] that they require you to wear?

A. Yes.

Q. And could you just list those out for the jury?

A. The splitters are required to wear steel-toed boots, uniform, white uniform, apron, cotton gloves, hard hat, hair net, earplugs.

Q. Anything else?

A. And safety glasses.

Q. All right. Now, let's talk about this hard hat. Is that required? Does Tyson require you to wear that hard hat?

A. Yes.

* * * *

[679] Q. All right. Why don't you take the jury through what your typical workday is, let them have some idea, you're the first hog splitter that's testified so they haven't heard any hog splitters testify before you. Okay? So just take them through a typical day so they will know what you do, how you make your living.

A. When I first arrive at the plant?

Q. Please, sir.

A. All right. When I first arrive at the plant, I park my car, of course, walk through security, go through the cafeteria to get to the locker room, go to my locker, unlock my locker, take my laundry bag out, take the pin off my laundry bag, remove my clothes and PPE equipment that is in there and hang it to where I've got room to put my street clothes in.

I take off my shoes, my socks, my pants, my shirt, and I hang them in the locker and then I put on my uniform, my pants, my shirt, and my work socks and my work boots and my hair net and my hard hat and I grab my—the remainder of any items and shut my locker and I go to the cafeteria to wait till five—five minutes before my shift starts.

Q. All right. You don't wear your boots because you [680] can't take them home, right?

A. No.

Q. Do you put your boots on first or do you put your—what you refer to as your whites, that's the company-furnished white pants and shirt, correct?

A. Correct.

* * * *

[681] Q. You have gone over the fact that you—okay. Let me get back to where I was. Do you put on the boots first or the whites first?

A. I put on the whites first because you can't get the pants over the boots.

Q. These are the boots right here, (Indicating) correct?

A. Correct.

Q. I am going to hand you what has been marked as D2002-2. Does this appear to be a pair of the white pants?

A. Yes.

Q. Ones you wear may be a little bigger?

A. I think so.

Q. Okay. They would for me too, Mr. Brown. So you put the white pants on and then the boots?

A. Yes.

Q. All right. And as of this point in time after putting on this ensemble that's required, have you yet to punch the clock?

A. No.

Q. All right. After you get all this on, what do you do?

[682] A. I go to the cafeteria to watch TV and rest before I start my shift.

Q. Okay. Are you on your own time at this point in time or are you on Tyson's time?

A. I'm on my own time.

Q. Okay. Approximately when do you get up, leave the cafeteria to go to your work station?

A. I try to leave five minutes prior to my shift start.

Q. All right. And what do you do when you get to your work station? Your work station is actually that saw, correct?

A. Yes.

Q. Okay. That 200-pound saw.

A. Yes.

Q. Approximately what time do you get to that work station?

A. My shift starts at 4:32 so I am up there probably about 4:26.

Q. Okay. And what do you do when you get to that—and let me ask you this. What time—what is your understanding of when your paid time starts?

A. When the hog gets to your work station.

Q. Okay. And you're there five minutes beforehand?

A. Yes.

Q. What do you do in that period of time before the hog starts getting there before your pay starts? What do you do?

[683] A. When I get up on the kill floor I finish putting on my PPE equipment and sanitation equipment, walk to my work station, make sure my lift works, make sure my saw works, and engage it by turning it on.

Q. You do all that before you get paid?

A. Yes, before the hog gets to my station.

Q. Okay. Now, you said you put on other sanitary equipment or PPE before pay time, but after you get to your station.

A. Correct.

Q. Would you tell the ladies and gentlemen of the jury what you put on?

A. When I get to my split station I put on my safety glasses, my apron, and my cotton gloves.

* * * *

[687] Q. Now, you described the events from your arrival to your workplace in the morning. Approximately how long from the time you grab your bag out of your locker until you get to your work station does that take you?

A. It takes me about four minutes to change in and it takes me—after I clock in a minute to walk up to the kill floor and to my work station.

Q. Okay. How do you know that?

A. I had timed myself.

Q. You've actually timed yourself before?

A. Yes.

Q. Okay. Now, sometime during the second shift, B shift, is a lunch break, correct?

[688] A. Correct.

Q. So if you took—let me go back. If it took you four minutes in the locker room and a minute to walk, let me ask you, it takes you a minute to walk from the clock to your work station?

A. From the locker room on up to the work station.

Q. So that's about five minutes in the morning?

A. Yes.

* * * *

[692] Q. What do you do at the end of your lunch break? What do you do?

A. At the end of my lunch break I return back up to the kill floor to get dressed back into my PPE and sanitation equipment and return to my split saw bench, engage my split saw and my lift station.

Q. And do you have to do that before the first hog arrives?

A. Yes.

Q. All right. And let's talk about the time then on your lunch hour—not an hour, on your lunch break. How long does it take you to wash up this—this five or six pounds of caked-up matter at the beginning of your lunch break? How long does that take?

A. From walking from my work station to the wash stall, two minutes.

Q. And how long does it take to walk from the wash stall to the cafeteria?

A. Another minute.

Q. Okay. And when you come back, how long does it take you to put it back on and get to your—from the time you leave the cafeteria till you put it back on to get to your work station, how long does that take?

[693] A. Minute and a half.

Q. So how long are you spending on these activities during your lunch hour?

A. After lunch, four and a half minutes.

Q. Are you paid for that time?

A. No.

* * * *

[695] Q. So at the end of the day—what time did you say the last hog is normally past your station?

A. Anywhere from 15 to 1:00 to one o'clock.

Q. A.m., in the morning?

A. Are you talking about starting shift?

[696] Q. End of shift.

A. End of shift, that's at p.m.

Q. And what do you do then? What are you required to do by Tyson before you can do like anybody else at the end of the day, get in your car and leave, what are you required to do?

A. Well, I have to disarm my saw and my work station, my split saw bench, and then I proceed to the wash stall to wash up my PPE and sanitation equipment.

Q. Okay. And when does your pay stop?

A. My pay stops when the last hog gets to my station.

Q. Okay. So after—after your pay stops, is that when you start disarming your saw?

A. Yes.

Q. Okay. Well, about how long does it take you from the time you disarm your saw till you walk to the work station? Wash station, I'm sorry.

A. It's probably a minute.

Q. Okay. You are not paid for that, are you?

A. No.

Q. Okay. You get to the wash station, what do you do?

A. Wash my hard hat, apron, boots, sometimes scrub them at the end of the shift because of the protein buildup.

Q. Are you still wearing the same apron all day, right?

A. Yes.

Q. Or does the—does the company expect you to get a [697] new one every day or do they expect you to maintain it?

A. They expect you to maintain it.

Q. You don't throw—roll this up and throw it in the garbage at the end of the day, do you?

A. No.

Q. How long does it take you to wash that apron at the end of the day after you cut up in half whatever many hundred hogs?

A. It probably takes, you know, a minute.

Q. Okay. And what do you do—how do you do that?

A. With a wash-off hose.

Q. And is that the 140-degree water hose you talked about?

A. 120.

Q. 120. What else do you have to wash off?

A. Hard hat, boots.

Q. What else?

A. My arms and hands because I get heavily soiled as well.

Q. And how long does it take you after you washed up—well, first of all, you have to disengage your saw, correct?

A. Yes.

Q. Let's talk about that time too because you're not getting paid for that time. From the time you—

MS. BURKHARDT: Objection, Your Honor.

[698] THE COURT: Sustained. We don't need the commentary and you know that's disputed too.

MR. DOOLITTLE: I apologize, Your Honor.

Q. From the time you disengage your saw until you finish washing and walk to the locker room and change and place your laundry bag, the one you removed that morning, in the dirty clothes hamper, how much time does that normally take you in the afternoon?

A. At end of shift it takes about eight to nine minutes.

Q. Okay. Are you required to put that dirty bag in the hamper?

A. Yes.

Q. Are you required to do that before you walk out the door to leave?

A. Yes.

Q. Is that about 18 minutes for the day that you are not paid for?

A. 17, 18, yes.

* * * *

[700] Q. Mr. Doolittle asked you earlier if—how you knew how long it took you to walk certain distances and you said that you had timed yourself. Do you recall that testimony?

A. Yes, but it wasn't the walking time. It was the change in, change out time in the locker room.

Q. And you testified in your deposition that you had never timed the walking?

A. At Tyson's I hadn't. At Farmland I did.

Q. And you testified in your deposition that you had never timed the clothes changing time at Tyson, isn't that right?

A. Correct.

[701] Q. So the only place you ever timed clothes changing time was at Farmland Foods?

A. Correct.

Q. And the walking time you testified in your deposition you've never timed, isn't that right?

A. Correct.

Q. So when Mr. Doolittle asked you that question, I saw you hesitate, you actually haven't timed that walking time, have you?

A. The walking time was an educated guess. It wasn't included in the change in, change out time, it is just something that you do on a daily basis that you somewhat know within seconds of what you're doing.

Q. I understand, but—

MR. DOOLITTLE: I am sorry. I think that it is a mischaracterization. I asked him if he timed himself at the locker. I didn't—

THE COURT: Overruled. He can answer the question if he thinks it is something different Go ahead.

BY MS BURKHARDT:

Q. When Mr. Doolittle asked you about the walk time and you said you timed yourself, you were mistaken about that, right?

A. I was thinking he was referring just to the locker room.

[702] Q. Now, I also want to ask you, this rubber apron, the rubber apron that Mr. Doolittle asked you a lot of questions about, made a big deal about, asked you a lot of questions?

A. Yes, I do.

Q. You are not required to wear this apron, are you?

A. As far as I know through orientation, no.

Q. There are other employees who do your job who don't wear the rubber apron, isn't that right?

A. I believe there's probably on A shift. I don't see them.

Q. You testified in your deposition, did you not, that there are other employees who do your job who don't wear this rubber apron?

A. Right Foremen come up there sometimes and don't use it either.

Q. Okay. Fair enough; but other people who do your job don't wear this—

MR. DOOLITTLE: Your Honor, he is trying to finish his answer.

THE COURT: No, he finished. Go ahead.

BY MS BURKHARDT:

Q. But did you—you testified in your deposition not about foremen, you testified there are other people who do your job who don't wear this rubber apron, isn't that right?

A. Right. There's a lot of people in the plant that [703] break the rules and regulations

Q. Have you ever seen anybody tell those people that they have to wear their rubber apron?

A. I am not privy to that information.

Q. Okay.

A. I'm hourly.

Q. So there are people who you see on a day-to-day basis who aren't wearing the rubber apron doing your job?

MR. DOOLITTLE: Lack of personal knowledge.

THE COURT: Overruled. Answer the question.

THE WITNESS: Yes.

* * * *

[706] Q. Mr. Doolittle asked you some questions about your day-to-day work routine. One of the things he asked you about was what you did after you went and got dressed in the locker room and I think you said you go and sit in the cafeteria and watch TV, is that right?

A. Yes, I did.

Q. And you relax in the cafeteria?

A. Yes.

Q. Is it your contention in this case that you should be paid for that time that you are sitting in the cafeteria watching TV and relaxing before you start work?

A. No, that's the reason why I arrive to work 45 minutes to 30 minutes early.

Q. There were a lot of questions about sanitizing and washing. Are you required to sanitize your hands before you enter the production floor?

A. Yes, you are.

[707] Q. And would you agree with me that it only takes a second or two to sanitize your hands?

A. It depends on the congestion of the hall or the area. A lot of times it is crowded. Depends on the shift change and people going in and out of different departments.

Q. Now, you didn't say that in your deposition, did you, when you were asked that question?

A. Crowded hallways slows down your process of timing in, punching in. Yes, I did.

Q. We're not talking about punching in, we are talking about sanitizing your hands.

A. It only takes a few seconds to sanitize. You walk by the sanitizer on the wall.

Q. Right. Okay. In your deposition you said—you were asked, "Is there anything else you do to get ready to go to the line?" And you said, "Before I walk into the hallway, the entryway, I sanitize my hands."

A. Exactly.

Q. And the question was, "Okay." Answer, "That's another requirement." That was your answer. And then the question was, "How long does that take—"

MR. DOOLITTLE: Can you tell me what page you are on?

MS. BURKHARDT: Page 90.

MR. DOOLITTLE: Thank you.

[708] BY MS BURKHARDT:

Q. The question was, "How long does that take," and your answer was, "Just a second or two, just run it underneath the sanitizer, rub it all over your hands." Was that truthful testimony?

A. Yes, exactly.

Q. The sanitizer is just there on the wall, right?

A. Right, on the entryway to the hall or the wash stall through the cut.

Q. Is it automatic, you just stick your hands under and the solution comes out?

A. Yes.

Q. And you would agree with me that takes only a second or two?

A. Yes.

Q. Now, as a split saw operator you're not required to dip any of your equipment at the end of your shift, isn't that right?

A. That's correct.

Q. So when you leave the floor, you don't have to dip anything in that dip tank?

A. That's correct.

Q. Mr. Brown, would you agree that it only takes one or two seconds to put in your earplugs?

A. That's correct.

[709] Q. And would you agree it only takes one or two seconds to put on your safety glasses?

A. Yeah.

Q. Would you agree it only takes one or two seconds to put on your hard hat?

A. Yes.

Q. And would you agree it only takes about 15 seconds per boot to put your boots on in the morning?

A. Yes.

Q. Do you think it takes maybe 60 or 90 seconds to put your whites on, your white pants and your shirt?

A. That would be close.

Q. It only takes you a few seconds, maybe three seconds to put your cotton gloves on each hand, would you agree?

A. Yes.

Q. And for your apron, would you agree it only takes you about 15 seconds to put that on?

A. Yes.

Q. But your testimony here today was that you think you're not being paid for something in the neighborhood of 20 minutes of time, is that what you told Mr. Doolittle?

A. No, I did not. 17.

Q. So you told Mr. Doolittle you thought that you are not being paid for 17 minutes of time?

A. Yes

* * * *

[714] Q. This four minutes that counsel also talked about, you timed that, did you not?

A. Yes, I did. Not at Tyson, at Farmland.

Q. Let me ask you, you testified you did the same job and His Honor let me ask you, the job was the same, that was your answer. Do you remember?

A. Yes, that's correct, the same job.

Q. At Farmland did you wear the same—was there any [715] difference whatsoever in what you put on at Farmland than Tyson?

MS. BURKHARDT: Your Honor, objection. First of all it is leading. Second, the Plaintiffs moved in limine themselves to keep out evidence of other jobs; and third, there's been no foundation laid that there's any relationship between Farmland and Tyson.

THE COURT: Hold it. He just said they're the same. The objection is overruled.

THE WITNESS: The only thing different from between Farmland and Tyson on that particular job is the color of the uniform. Blue at Farmland, white at Tyson's.

BY MR. DOOLITTLE:

Q. Any other difference?

A. No.

* * * *

[716] MRYLON KIZER,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning, Mr. Kizer.

A. Good morning.

Q. You and I have not had the pleasure of meeting before, have we?

A. No, sir.

Q. I am going to try to get you on and off as quickly as I can. Tell us what your job is.

A. My job is complex manager at the Storm Lake pork facility.

Q. And what—is that the top job at the Storm Lake complex?

A. That is correct.

Q. Everyone there reports to you?

[717] A. Mostly direct, some not at line two corporate.

Q. And you report to no one at Storm Lake, correct?

A. That is correct.

Q. You report to Dakota Dunes, corporate office of Tyson?

A. That is correct.

Q. All right. And how long have you been the top official at the Storm Lake plant?

A. Just a little over 11 years

Q. And how long have you been in the meat packing business?

A. A little over 40 years

Q. And you said—did I ask you how long you have been at Storm Lake?

A. Yes

Q. I am getting tired here, but would you agree that the employees are expected to produce a safe, uncontaminated meat product and that's one of their primary responsibilities?

A. Along with making sure it is very wholesome and in specifications and top quality, yes

Q. And that's very important to Tyson as a business, correct?

A. That's important to our customers and Tyson, yes.

Q. What kind of customers do you sell your meat to from your Storm Lake plant?

A. We sell our product to a lot of customers Some of [718] the local ones, our grocery stores would be like Hy-Vee, Fareway, we also sell to some of the bigger ones, Wal-Mart, Costco, Sysco.

Q. So it sounds like most of your customers are in the business of reselling your meat in the supply chain, correct?

A. Yeah, most—like the grocery stores, they sell right directly to the household people.

Q. All right. But the meat here eventually reaches into schools and hospitals and people's homes, correct?

A. That is correct.

Q. And so it is extremely important that the employees have as their primary responsibility to produce a wholesome, safe product, correct?

A. Correct.

Q. Tyson can't stay in business if it doesn't have a wholesome, safe product to sell, can it?

A. That's a big part of it, yes.

Q. All right. And employees are not allowed to step up to the line at the start of gang time unless they already have all this sanitary gear and equipment on and their personal protective gear and equipment on, correct?

A. Yes.

Q. All right. And if they did not have that personal protective equipment and sanitary gear and equipment that we have all been looking at this week, they wouldn't be able to cut [719] the meat or handle the meat that you are wanting to sell to your customers, correct?

A. Yes.

Q. And so the primary benefit from employees wearing this gear is so they can start to do their work so your conveyor belt can run so your meat can be cut and wrapped and shipped to the customer, correct?

A. Yes.

* * * *

[726] Q. Sure. I am sure that's a concern of yours; but it is also a very important concern of yours as the complex manager to keep your workers' compensation claims and payments to employees who are injured to a minimum, correct?

A. That would be any business' goal, yes.

Q. And by requiring these items to be worn, you're able to minimize workplace injuries which minimizes worker compensation payments to settle lawsuits, correct?

A. That's part of it, yes.

Q. And that's part of your job in running the plant or the complex is to keep your eye on these workers' compensation claims so they don't get out of hand, correct?

A. It's my job to make sure we have a safe work environment for our people, yes.

Q. And requiring this various protective gear and [727] equipment that is to protect the employee, that allows you to satisfy the OSHA requirements, correct?

A. That's part of it, yes.

* * * *

Q. Let's look at Exhibit 153, page one. There we are. We have seen this before in this case and it is in evidence, but I wanted to ask you just a couple questions. First of all, it says there in the first sentence it is for the Storm Lake plant, [728] correct?

A. Yes.

Q. And this says Product Soundness. That's what we've been talking about in terms of a safe, wholesome product for sale on the market, correct?

A. Yes, it is part of it, yes

Q. Now, there's this line here in the third paragraph I want to ask you about. It says, "Tyson Fresh Meats, Inc., has chosen to run its business under the Government Inspection Program." Now, why did you choose to run your business under the Government Inspection Program?

A. Well, the Government Inspection Program is a very high-rated government program and Tyson wanted to be part of that program and to go by those guidelines.

Q. And does the general public put stock in the fact that the USDA has approved your meat?

A. Yes, they do.

Q. That helps you market your meat, correct?

A. It shows that it is a very wholesome, good product, yes.

Q. That helps you sell it and make your profit, correct?

A. It's part of the equation, yes.

Q. All right. And then the next paragraph it says, "The government inspection team has the task of seeing that all requirements of sound product control are applied every day. If [729] regulations are broken, they have the authority to tag production or shut off production until the problem is solved." Now, that—that is referring back to this Government Inspection Program that Tyson has chosen voluntarily to become a part of, correct?

A. Yes.

Q. And the employees achieve that for you by putting on the required sanitary gear and equipment, frock, hair net, beard net, that type of thing, gloves, aprons, which allows you to satisfy the Government Inspection Program and not get shut down, correct?

A. That's part of the equation, yes.

Q. And the primary benefit of not getting shut down is to Tyson, correct?

A. Correct.

Q. So you would agree then that the primary benefit, not the only benefit, but the primary benefit from the wearing of this equipment is for Tyson to operate its business?

A. That and keeping our team members very safe by wearing that equipment.

* * * *

[732] Q. The industrial engineer is one person that reports to you, correct?

A. No, he reports to corporate.

Q. Okay. But you have this—you have a plant engineer that is assigned strictly to your plant, correct?

A. That is correct.

* * * *

Q. All right. The industrial engineers will do time studies of particular jobs and particular aspects of jobs whenever there's a change in the production process, is that correct?

A. Yes.

* * * *

[734] Q. Is it true that more often than not employees work most Saturdays and have a 48-hour week in the production departments?

A. In our case at our plant we work a lot of Saturdays, yes.

Q. Give me your best estimate.

A. Of how many Saturdays?

Q. Yes.

A. I am going to say 60 plus percent.

Q. All right. And when you have Saturdays that means your production employees are working 48 hours a week on gang time, correct?

A. Yes, they're working, yes.

* * * *

[745] Q. Do you recognize where this picture is taken?

A. Yes, this is on the slaughter floor and it's the spike table.

Q. And I believe Mr. Sager referred to the men that are shown here in this photograph as chiselers, is that a familiar term?

A. Chiseling heads, yes.

Q. Do you see the two men in the foreground?

A. Yes.

Q. Are they wearing gloves on the hand they are holding their chisels in?

A. No, they are not.

Q. If you look at the man who is standing in the background holding his chisel, is he wearing a glove on the hand he is holding the chisel in?

A. Yes, he is wearing a yellow cotton glove.

Q. Is that cotton glove necessary for that chiseler to do his job?

A. No, it is probably a comfort, he feels more comfortable using a cotton glove.

Q. And how would that contrast from the two men in the foreground of the picture?

A. They're obviously more comfortable not wearing a [746] cotton glove while they chisel heads

Q. Is the man wearing the cotton glove violating any sort of plant policy by choosing to wear one?

A. No.

Q. Are the two men in the foreground who have chosen not to wear one, are they violating any sort of policy?

A. No, they are not.

Q. Why does the plant provide cotton gloves to the positions such as the chiseler?

A. The main reason is for warmth and comfort and some of them use it to keep their hands dry.

Q. Do you see that the two men in the foreground appear to have facial hair?

A. Yes.

Q. Are they wearing beard nets?

A. No, they are not.

Q. Is that okay under plant policy?

A. Plant policy states that they should have them on, but we don't enforce it because of the temperatures up on the kill floor.

Q. So is that practice specific to the kill floor?

A. Yes.

Q. Do you see that the two men in the foreground are wearing white shirts?

A. Yes, they are.

[747] Q. Are those the white shirts that are issued by the company as part of the whites?

A. Those particular front two are wearing T-shirts. I would guess that they are T-shirts that they purchased themselves.

Q. When you say purchased themselves, do you mean that they purchased at a store, someplace else?

A. Yes.

Q. Their own personal item?

A. Yes.

Q. Is it okay for them to be wearing their own personal T-shirts to work on the kill floor?

A. On the kill floor as long as they are white and they are clean every day.

Q. I would like to go now to Defendant's 2232-41. Do you recognize where this is in the plant?

A. Yes, I do.

Q. Could you just briefly remind us where we are?

A. This is in the cut floor area.

Q. Is this near a machine called a Cryovac machine?

A. Yes, it is a Cryovac packaging machine.

Q. Do you see the man in the foreground?

A. Yes.

Q. Is he wearing an apron?

A. No, he is not.

[748] Q. Do you see the man standing behind him?

A. Yes.

Q. Is that—are these two men performing the same job?

A. Yes, they are.

Q. Is the man behind him wearing a plastic apron?

A. Yes, he is.

Q. Is the plastic apron necessary for either one of these men to do their job?

A. It is not necessary, but it is probably a comfort for the one gentleman with his apron to stay warmer and cleaner.

Q. But if he were not wearing it, would he still be able to do his job on the Cryovac machine?

A. Yes, he would.

Q. Why does the plant provide rubber aprons to team members such as the two individuals shown here?

A. To keep their outer garment—their frock dry and clean. Also it is easier for them to clean up.

Q. If we can now go to D 2232-19 Do you recognize where we are here?

A. Yes, this is on the kill floor on the end of the head table.

Q. Does this man have facial hair?

A. Yes, he does.

Q. Is he wearing a beard net?

A. No, he is not.

[749] Q. Is that okay for him not to be wearing the beard net?

A. Yes, we don't—we don't discipline for not wearing it.

Q. And why have you chosen not to discipline for not wearing it on the kill floor?

A. We just feel that because of the warmer temperatures up there, it is just a deterrent and it just is not comfortable for the team members to wear.

Q. Is that an example of how you have tailored a policy to plant needs?

A. Yes, it is.

* * * *

[771] Q. Let's look at what your policy says in this exhibit, let's look at Section 5.3 called Hand Washing. This says, "Team members must wash hands thoroughly with an approved hand washing and sanitizing compound in an adequate hand wash facility before starting to work, after each break, or any absence from the processing area." That is your policy that you give and tell to your employees, correct?

A. That is written in this policy, but since then because of our hand sanitizers, unless they go into the restroom to use the facility there, they still have to wash their hands; but now with the sanitizers at the front entrance of the departments, they're allowed to use the hand sanitizers that sanitize their hands.

Q. And this policy we're looking at is dated—let's go back to the first page. It says last revised January 5, 2009. So we know at least as of that date employees weren't using just a hand sanitizer like you have described and that you testified to with your counsel asking the questions, but they were required to comply with this policy I just read which says, [772] "Team members must wash hands thoroughly with an approved hand washing and sanitizing compound in an adequate hand wash facility, "correct?

A. Correct.

* * * *

[778] Q. All right. Let's go to your Exhibit 153 which is the one that you said was for Storm Lake itself or by itself. I want to go through some of the rules that you've got on this Storm Lake policy. Let's look at page three, Paragraph 9, says, [779] "Edible product team members assisting inedible product team members must clean hands and change gloves and clothes before

handling edible product." Now, that is your policy and you enforce it, correct?

A. That is correct.

Q. Next paragraph, Paragraph 10, "Equipment improperly placed—inform team member to hang them in the proper place and if they get contaminated, team member needs to clean them immediately," correct?

A. Correct.

Q. That is your policy and you enforce it?

A. Correct.

Q. Paragraph 17, "You need to cover cotton gloves when handling spacers or edible product," correct?

A. Correct.

Q. That is your policy and you enforce it, correct?

A. Correct.

* * * *

[783] Q. But it is true, isn't it, that if you didn't require your employees to do—to wash that equipment after gang time has ended, you would have to pay some other employee to do that, wouldn't you?

A. Well, our team members wash up their equipment at the end of the shift themselves.

Q. I understand that. And that's a benefit to Tyson in the sense that you don't then have to pay someone else to wash them, correct?

A. Correct.

Q. In fact, the only person that benefits from requiring these employees to wash their equipment after gang time ends is Tyson itself, correct?

A. Correct.

* * * *

[784] Q. Paragraph 35 of the same Storm Lake document says, "Aprons, knives, sleeves, or belly guards, et cetera, should be hung on hooks high enough to keep equipment from touching the floor. If equipment touches the floor, it must be washed before using, "correct?

A. Correct.

Q. And that too is a policy that you have at the Storm Lake plant and that you do enforce?

A. That's correct.

Q. Paragraph 41, this is the last one, "If cotton gloves are dropped on the floor, they must be changed for clean gloves." Now, that too is a policy at Storm Lake that is enforced?

A. That's correct.

Q. And the reason that you have that policy and you enforce it is to prevent product contamination, correct?

A. Correct.

Q. Because if the product is contaminated, you can't sell it, correct?

A. It can be reconditioned and then sold.

Q. But that requires extra labor, correct?

A. We have people on the payroll already doing it.

Q. Any—you want your meat to be done right the first [785] time so you don't have to pay someone else to do it a second time, correct?

A. Correct.

Q. And that's an employee responsibility to the best of their capability is to do it right the first time?

A. That is correct.

Q. And that benefits Tyson?

A. Yes.

Q. Makes you run smoother, correct?

A. Puts out more wholesome product, yes

Q. Makes your operation more efficient and cost effective, correct?

A. Yes.

Q. Contributes to profits?

A. Yes.

* * * *

[787] Q. Lastly you said something about your turnover rate being 16.92 percent last month. Now, it has been a lot higher than that before last month though, hasn't it?

A. The prior month it was about 17 percent.

Q. 2009 it was 39 percent, wasn't it?

A. I don't remember the numbers back that far.

[788] Q. Well, you know that your turnover rate was a lot higher in 2009 than it is today?

A. Industry standard was—across the board they all were higher, yes.

* * * *

[818] KENNETH SCOTT MERICLE, Ph.D.,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as follows

EXAMINATION

BY MR. WIGGINS:

Q. State your name, please.

A. My name is Kenneth S., Kenneth Scott Mericle.

Q. All right And Dr. Mericle, by whom are you employed?

A. I'm employed by the University of Wisconsin Extension.

Q. All right. And did you do some work on a time study at the Storm Lake plant?

A. Yes, I did.

Q. And do you have a degree in industrial engineering?

A. Yes, I have a Bachelor's Degree from Iowa State University in industrial engineering.

Q. All right. And tell us, do you have a Master's Degree?

[819] A. I also have a Master's Degree from Iowa State University in economics.

Q. All right. And do you have a Doctoral Degree?

A. I have a Ph.D. from the University of Wisconsin in industrial relations.

Q. All right. And have you done time studies in the past?

A. Yes, I have.

Q. Is that a—something that comes within the field of training of an industrial engineer?

A. Yes, it does.

Q. How many times have you performed time studies?

A. Hundreds and hundreds of times.

Q. Over how many years?

A. 30—probably about 40 years

Q. When did you obtain your industrial engineering Bachelor's Degree?

A. 1967.

Q. And I don't know if I heard, I might have missed it, what university did you obtain that from?

A. That was Iowa State University in Ames.

Q. Iowa State. Okay. What is a time study?

A. A time study is a study of the—it's usually used to set up—set a production standard so what you're doing in a time study essentially is estimating the amount of time that [820] will be allowed for performing a certain fixed set of tasks

Q. And what did you do in order to be able to do a time study at the Storm Lake plant?

A. At Storm Lake I went to the plant with two videographers, one was a member of my department, another faculty member in my department at the University, and the other was a young man who is an undergraduate in the business school at the University of Wisconsin and we essentially spent two full shifts on one day and one shift on the second day filming

various activities in the plant related to donning, doffing, cleaning, and related work activities.

We then took the videotape and analyzed it. We identified on the videotape the activities, identified the starting point of the activity, the ending point of the activity, and calculated the elapsed times for the activities.

We then for an activity calculated the average time for the activity, did that for the kill area of the plant and the fabrication area of the plant, and computed average times for each of the activities and the total average time for donning, doffing, related work activities for the two areas of the Tyson plant in Storm Lake.

Q. And the work that was done that you just described, was that done on behalf of the—in your capacity as an employee of the University of Wisconsin?

A. The—yes,

* * * *

[827] Q The work you did in conducting a time study at Storm Lake, does that come within your field of expertise in industrial engineering?

A. Yes, it does.

Q. Why?

A. Well, it's—it's similar to what industrial engineers do on, you know, a daily basis when they set time studies, has some important differences, but essentially it involves estimating the amount of time that relates to various work tasks, work activities, and that's what I was doing in the—in the Storm Lake plant.

* * * *

[845] Q. All right. And which days, if you recall, were you at the Storm Lake plant?

A. I was there on April the 23rd and April the 24th.

Q. Of what year?

A. 2009.

Q. All right. And do you know if you ever did any work for Hamilton or McCafferty or any of the Plaintiffs' lawyers in this case before 2009?

A. You know, I don't think so.

Q. Okay. Now, how many hours did you spend in the plant on those two days?

A. I spent about 17 hours the first day we went in at five o'clock in the morning, I don't think we got out until [846] around midnight or so.

Q. Your faculty colleague, I can't remember his name.

A. Michael Childers.

Q. Michael Childers, how many hours did he spend in the Storm Lake plant on those two days?

A. Well, all three of us spent the same amount of time. The first day we all—we spent 17 and a half hours and the second day it was about eight or nine hours

Q. And why did you spend so long on the first day?

A. Well, we wanted to cover both of the production shifts.

Q. A shift and B shift?

A. Yeah, we had two days scheduled and we wanted to collect as much data as we could so we tried to stay for A shift and B shift.

Q. All right. And so that's three people spent about 25 or 26 hours each in the plant?

A. That would be approximately right.

Q. Did you divide the work between you?

A. Yes.

Q. How?

A. Well, we—we—we each had video cameras and we—we generally moved as a group from one activity to another activity, but once people had a general orientation, they were essentially on their own to film the activities so Michael and [847] Gavin were working more or less independently from me.

Q. Okay. And I think it may be easiest to understand this. Let me go a little bit further and then we will use a video to try to understand this. Did you, once you got to the plant, decide to divide up the videotaping into segments of different parts of the plant?

A. I would describe it a little bit differently. We identified activities and we organized the videotaping around the activities. For example, we knew that a lot of the donning occurred in the locker room so we knew that we would be filming donning in the locker room.

Now, there was some complications related to that because some of the donning in the locker room involves stripping down to underwear or to skin and the company took the position that on the first day that we would not be allowed to film in the locker room. On the second day we reached an agreement with them that we would not film the people in the kill area where they did the—the strip down, but that we would be able to film the people in fabrication so that's an example of an activity.

We knew that some of the donning occurred in the workplace and so a second activity would be finishing donning in the production area. That was the second activity. In between, of course, you have to walk from the locker room to the workplace and I knew that I was going to have to analyze that [848] walking time. I made a decision not to film that so that we could focus more on the locker room donning and the donning in the production areas and I used an industrial engineering technique to estimate the amount of walking time based on the distances that people walked and standard walking speeds

At the lunch break it is pretty straightforward. At the unpaid lunch break, people have to take off much of their equipment and so we were able to film the doffing of equipment at the beginning of the lunch break and the donning of equipment at the end of lunch break and then the end of the day was pretty much kind of a mirror image of the start of the day, except that there was a more substantial cleaning of the equipment at the end of the day so that people could put clean equipment back into their—into their lockers. I think they are required to do that so we have doffing and cleaning in the work area and then we have the final doffing back in the locker room and again I estimated the walking time from the work station to the locker room.

Q. All right. Now, did you submit a report to Tyson about your time study?

A. I submitted a report to Plaintiffs' lawyers, yeah.

Q. All right And then I want to show you Table 5 to your report and if we could get that up.

THE COURT: Is this exhibit in evidence, Mr. Wiggins?

MR. WIGGINS: This exhibit is—what is the exhibit [849] number?

MR. ARCINIEGAS: 242.

MR. WIGGINS: It is Exhibit 242, Your Honor, and we have an agreement with the Defendant that they will not object to the tables

THE COURT: Very well. Are you offering them there?

MR. WIGGINS: We offer.

THE COURT: The tables attached to 242 are received.

BY MR. WIGGINS:

Q. Is this your table that you authored and created for your report that lists the activities that you studied?

A. This is—somebody has taken my results and reformatted and put it on this slide; but yes, these are my activities, my times, my observations.

Q. And other than the colors, is it the same as in your report?

A. Actually the colors are the same too.

Q. The colors are the same?

A. Yes, it is.

Q. Okay. Now, does this list for the fabrication department only what you just described as the activities that you divided in order to study?

A. Yes, and I see that I—there are a couple that I didn't mention. For example, dipping the scabbard and washing hands before going into the fabrication area.

[850] Q. All right.

A. And then inspect and disinfect when you come out.

Q. So—and then you gave each activity a number, one through 10?

A. Yes, except I did not use the number three and to be honest with you I don't remember why.

Q. So there's nine activities for the fabrication department listed, correct?

A. Yes.

Q. All right. What are the pre-shift, before gang time activities?

A. Those would be one, two, and four and that would involve the donning of equipment in the locker room, the walking time is included in element number 10 as part of the walking time, and the dip scabbard and wash hands and the don equipment pre-shift in the department, those are the pre-shift activities.

Q. Okay. And you have a column called Observations.

A. Yes.

Q. What does that mean?

A. Those are the number of subjects who we could identify on the videotape and with usable information on the videotape who performed that activity so I had 88 observations of people donning their equipment prior to the start of the shift in the locker room and 100—

Q. Activity number one, that's activity number one?

[851] A. That's activity number one, so that's just the number of observations of each of these nine activities that we had.

Q. When you did the videotape were you able to use all the observations that you got on the tape?

A. No, there's a lot of video footage where you lose the person or they don't, you know, for various reasons it is impossible to use the information.

Q. What was the bare minimum data that had to be shown on the tape in order for a segment or a sequence for a particular observation to be considered complete and usable?

A. You have to have the time that the activity starts and the time that the activity ends for it to be usable.

Q. All right. Now, let's just take an example. First of all, let's look at the average time and understand that quickly before we go to the table itself. Let's take activity one as an example. That's pre-shift donning at the locker room. You say it's 4.56 minutes in hundredths, correct?

A. That's correct.

Q. That is not four hours and 56 minutes, that's four minutes and approximately a half a minute, correct?

A. That's correct. Industrial engineers use hundredths of a minute rather than seconds just because it simplifies the math, any calculations you make then you don't have to convert from seconds to minutes so the stopwatch that industrial engineers use is calibrated in hundredths of a minute. The [852] video camera is calibrated in minutes and seconds so I convert that to decimal minutes in order to be able to, you know, be able to add and subtract these numbers

Q. Let's look at line two as an example. When we say 0.17, that is not 17 seconds, is it?

A. No, that's .17 times 60, that would be about 10 seconds.

* * * *

[858] Q. 38. Let's stop it at 38. There we are. What is he doing at the moment you stopped timing him?

A. I stopped timing him when he starts the walk.

Q. What is that he took off there? Can you tell?

A. I'm sorry, I wasn't watching the tape.

Q. That's fine. All right. Now, that—what we saw from 2:44:00 to 2:47:38 was how much time?

A. 3.63 minutes

[859] Q. All right. What did you do with that time?

A. That became one of the—of the times that I used to calculate the average time for this particular—for this particular activity, donning in the locker room, so that would be one out of 88 times—

Q. All right.

A. —that I used.

Q. Why do you stop it at the moment he's closed the locker and is turning to about start walking?

A. The walking time is measured from the center point in locker room to the center point in the department, that distance, so in calculating the walking time, I want to isolate the walking activities and use the distance and the speed to determine what the walking time is so the end of the first activity is also the beginning in this case of the walking time. This is when he starts the walking time.

Q. All right. So did you use videotapes on the walking segment from the locker room to the production line?

A No, I used prints that were provided by the company that identified the walking path and the distances and then I multiplied those distances by three miles an hour walking pace for the first part of the walking from the locker room to the department door and then I reduced the speed of walking to 2.5 miles per hour when the subject entered the department so I divided the distance between the center line of the walking—[860] center line of the locker room to the department door and department door to the work station and multiplied by two different speeds, came up with a total amount of time and that became a part of the walking time.

Q. Okay. And is that—is that something that industrial engineers do?

A. Industrial engineers estimate walking time by measuring distances and multiplying by speeds all the time. That's an accepted procedure in industrial engineering.

Q. Is that the way Tyson itself did it?

A. I don't know that I know how Tyson did it. I wouldn't be surprised if that's how they do it.

Q. Okay. Do you know of any industrial engineer that has stepped forward to say you didn't do it right?

MR. MUELLER: Objection. Foundation, and I am not sure even what he is asking, stepped forward to whom.

THE COURT: Sustained.

BY MR. WIGGINS:

Q. All right. Now, for that walking segment where they're taking their scabbard and their belly guard and that type of thing to some other point, did you use what you have been calling observations or sample sizes?

A. No, I don't have to because, you know, I'm estimating that walking time from the blueprint and from the walking speeds so I basically analyzed the walking time once, center point to [861] center point and, you know, get the distances multiplied by the speed and that's the walking time so it is not like the filming where I am filming a bunch of people and computing an average, I am simply calculating what industrial engineers would accept as the average walking time from point A to point B.

* * * *

[864] Q. In your study were you concerned with which particular items a person is putting on in the locker room versus which ones they put out on the line?

A. No, I was not. I was concerned of having a group of people who put on a representative mix of equipment in the locker room and likewise a group of people who put on a representative mix of equipment out on the line. Some people put a lot of equipment on in the locker room and not much out on [865] the production floor and other people put not much on in the locker room and put more on out in the production area.

Q. Let's look at Table 5 again since we're on activity one, what was the average time you found from your study of all 88 individuals like we've been looking at?

A. 4.56 minutes. It is four minutes and 31 or so seconds, 32 second seconds.

Q. So the first man we looked at in sequence 77 was a little bit less than that?

A. Yes.

Q. 3.63?

A. Correct.

Q. The second man on sequence 76 that we looked at was a little bit more than the average, he was at 5.05?

A. That's both correct.

Q. Did you see anything that they did during that three minutes for one and five minutes for the other that you felt like should have been taken out and not counted?

A. No.

Q. All right. Now, we have now seen two of those 88, correct?

A. Yes.

Q. Now, we don't need to see all 88 to understand your system, do we?

A. No.

* * * *

[886] Q. All right. Now, is videography an accepted means [887] within the field of industrial engineering for conducting a time study?

A. Yeah, you can do a time study from a video image, you can use a video camera to collect the times so yes, it is accepted as a way of capturing the time for the activity that you are studying.

Q. All right.

A. That's one step of doing a time study, but it is a very important one and yes, it is a perfectly legitimate technique.

* * * *

[895] Q. I want to talk to you about the methodology. Would it be a proper method to determine the times or the reliability of the times to look only at the shortest person and the longest person rather than all of the people that were observed?

A. No, this is an important point I think because you're—you would be zeroing in on only two of the subjects and on—on my activities I have sample sizes that are on average 53 subjects per activity so you'd be making a comparison of the two extremes, the person who took the shortest amount of time and the person who took the longest amount of time.

If you actually look at the time values, most of the times are clustered around the average so what they'd be doing is drawing some conclusions way out at the extremes that really don't have much to do with, you know, what is really being captured here which is that there's a lot of central tendency, most of the people are using about the same amount of time, plus or minus a little bit, so not a very relevant comparison in my opinion.

Q. All right. Let's take the shortest person, let's take [896] a hypothetical. If we look only at the shortest amount of time for pre-shift donning in the locker, would that tell us anything reliable to know?

A. No, I don't think so. You would want to know what the individual was doing, but again, I would repeat what I said before, you can't zero in on one individual, particularly the most extreme individual, and draw very meaningful conclusions from it. That person may not

have required much time because they decided that they're going to don most of their equipment in the department as opposed to in the locker room or, you know, the person might be exceptionally fast.

The person could just be, you know, vigorous, done this a lot, really knows how do it the most efficient way, prides himself on doing it the most efficient way, decides not to do much of it in the locker room, I don't think that observation alone tells us anything really of value about—about the—the calculations of the average and the use of the average to understand how much time it takes the group of people to do the activity.

Q. Okay. Let's put up Table 5 one more time. If you took—

MR. ARCINIEGAS: Five or six?

MR. WIGGINS: Five.

Q. If you took the shortest person for activity one, what would that person likely be for activity four?

[897] A. Likely not to be the shortest.

Q. Why is that?

A. Well, because probably the person who was the shortest on activity one was donning less equipment in the locker room and putting more equipment on in the department.

Q. And by the same token if we took the longest person in the locker pre-shift, would we know anything about him if we didn't know also what he did out on the line, if anything?

MR. MUELLER: Objection. Foundation and form.

THE COURT: Overruled. Answer, if you understand it.

THE WITNESS: Could I hear the question—

BY MR. WIGGINS:

Q. It was a bad question. Let me rephrase it. Is there a relationship between the donning in the locker room and the donning in the production line?

A. Yeah, there's a relationship. You don the equipment either in the locker room, you might don it while you are walking between the locker room and the department, or you don it in the department, one of those three locations, so if you do it in one location, you don't do it in the other locations.

Q. So if you're a short person in the locker room, what are you likely to be at the production station?

A. At the very least longer. You might be a long person, but you might not have a lot of total equipment to put on.

Q. All right. Now, if we were to just take a group of—[898] let's just say we don't take the very shortest, we just take a group of the short people, would that be a reliable method for determining anything about these times?

A. I don't think any method where you select a subset of the total data set and draw conclusions from it really tells us very much of value in terms of estimating the the amount of time for the activity. If the data is available, we should use all of it.

Q. If we had a person or a group of people that had a short amount of time in the locker room, do we know where they donned the rest of their equipment?

A. Well, they either donned it while they were walking to the department or they're going to don it in the department.

Q. And you did not film the walking in the hallway?

A. No, I didn't.

Q. Now, by the same token if we take a group of the shortest people in the locker room and compare them to the longest people in the locker room, is that a fair comparison?

A. Depends on what kind of conclusions you're—what questions you're asking I guess; but, you know, the people who are in the group that takes the shortest amount of time on average will be donning fewer pieces of equipment.

Q. Right. Okay. So just looking at a short time doesn't tell you how many pieces of equipment they were donning, does it?

[899] A. No.

MR. MUELLER: Objection. Leading.

THE COURT: Sustained.

BY MR. WIGGINS:

Q. What other factors will cause one person's time on one segment to be shorter or longer than another person's?

A. Well, they might do it in a slightly different way, they might do the activities in a different way, they might have different levels of skill, they might have different physical health, they might have some restrictions, work pace comes into play, a lot of different factors come into play when, you know, we're trying to explain individual differences in this way. That's why we take large samples.

Q. What is allowance time?

A. Allowance time is a concept that is used in setting a production standard by industrial engineers and in the process of setting a standard, the industrial engineer will estimate the amount of time that is required for performing the task that they're studying, okay, so that's kind of like the pure work time and in recognition of the fact that people don't do pure work their entire work shift, engineers build allowance time into the standard.

Why don't they do—expect people to do pure work the entire shift? Well, people have needs, they have personal needs, they need to go to the bathroom, they need to get a drink [900] of water, they have social needs, they need to talk to their co-workers, they experience fatigue during the day and so a part of the allowance time reflects the fact that work is fatiguing and they experience delays, they experience short delays during the day that takes time away from doing work so in order for the production standard to be fair, the industrial engineer will add a certain percentage of time to the pure work time in recognition of the fact that people do get fatigued, that they do have personal needs, and that they—they experience delays so that's the concept of allowances.

Q. And is there a standard that industrial engineers use to factor in these allowances?

A. You know, they're—depends on the nature of the work. Some work is more fatiguing than other work, in some circumstances the personal needs of the work force will be higher, so there are a kind of guidelines in each of these areas. The textbooks will typically talk about allowances in the range of 10 to 15 percent of the pure work time.

Q. All right. Did you include any allowance time in your study at the Storm Lake plant that we've been going over?

A. No, I wasn't setting a production standard. I was trying to estimate how long it took these people to do the activity so I did not—I did not estimate the pure work time and then add the allowances back in again.

What I did do was if they experienced a short delay, [901] maybe there's congestion in their walking path or they have to wait to get around somebody to get access to something, I—or if they stopped and talked for a minute, it's very seldom a minute, if they stopped and talked for a few seconds to somebody, I left those time values in in recognition of the fact that those—in a production standard some time for that activity would be put back in.

* * * *

[902] Q. Now, if someone were to disagree with you and wanted to cull out something else, let's say maybe it is not a bathroom, maybe they thought they talked a little bit too much [903] or they went off camera somehow and you couldn't see them at that moment, could someone go in such as Tyson and use your tapes and use your start and stop times that calculate the elapses and edit these times?

A. Yes, my—my study is totally transparent in the sense that I identify every subject who I studied from the point that the activity started until the point that it ended, I identify the videotape and the DVD or the source material for the images so anybody could go back and run the DVD to the point where the activity started, watch it during the activity until the point that the activity ended and decide that they have a

different opinion about what time should be included and what time should be excluded.

* * * *

[906] Q. Now, let's say that someone looked at that particular clip and said I think 15 seconds ought to come out of that. Could they do it?

A. Yes.

Q. And they would just have to do what?

A. They would have to locate the tape, 17, they would have to load it into a—excuse me, it is a DVD at this point, they would have to load it into a DVD player, they would have to advance to the time at the start of the activity, 5:57:14, and then they would have to watch it from that point until the end of the activity drawing whatever conclusions they want to draw about what they saw.

Q. Let's say that you started at 5:57:14 and 20 seconds later there's a 15-minute interlude of some kind, either they went to the—15 seconds, they went to the bathroom, talked to someone too long, did something. What could you do to edit out that time?

A. Well, you could—you could do a lot of things. You could add a couple columns to the spreadsheet, put the starting time in, the ending time of that interlude, calculate the elapsed time, and then subtract it from this number right here. (Indicating)

Q. Do you know of any industrial engineer at Tyson that has done that?

[907] A. Not to my knowledge.

Q. Let's take that down. I want to change subjects. Did you film continuously from the first activity in the locker room to the last activity on the line pre-shift?

A. No, I filmed those in—as separate activities.

Q. All right. So you don't have a constant first activity in the locker room all the way to the last activity when gang time begins, do you?

A. No, I don't.

Q. Why?

A. If I were to do that, I would have to select the individual and follow the individual as they donned the equipment in the locker room, walked to the line, finished donning on the line, and it would take a considerable amount of time to time one individual and so the number of individuals we would be able to time would be far fewer than if we had timed the activities separately in the locker room, in the department, and in estimating the walking time. If I were to do it picking up the same individual and following them, it would take weeks to do a study like this.

Q. Do you know of any effort by Tyson industrial engineers to do that?

MR. MUELLER: Objection. It's not—he has no foundation either way.

THE COURT: Sustained.

[908] BY MR. WIGGINS:

Q. Did you do this on a job-by-job basis, that is just take the ones on this particular job and then study them and then take this particular job and study them all separately?

A. No, I didn't. I studied people in the two areas separately, in kill and fabrication. There's no way that I could know what a specific job an individual does.

Q. What effect would it have on sample size, if any?

A. I think it would reduce the number of observations of the sample size pretty substantially because I would have to determine what their job is and that would take a fair amount of time and I—it would slow the whole process down.

Q. Okay. Now, I want to go back to sequence 77, the very first tape we looked at. Do you remember the fellow that had—took out the big coat and put it on?

A. Yes, I do.

Q. All right. And we saw other people to the side of him also putting on sweaters and things, but I want to ask you about that. Did you include employees taking things out of their lockers such as personal sweaters, coats, jackets to put under their frock?

A. Yes, I did.

Q. Why?

A. Because the temperature in the fabrication area is below 40 degrees and you can't go into that area and work all [909] day long with just the smock on so people put on extra insulation. You can't do the work really without putting a jacket or a sweater or fleece or a hoodie or something on to keep you warm.

* * * *

Q. When you were doing this time study, were you alone?

A. No.

Q. Who was going around with you?

A. There was a group of people who followed us around that consisted of Defendant's lawyer and some representative from management which included some

human resource department managers, industrial engineer I think, yes, there was at least one industrial engineer, Plaintiffs' lawyers were frequently there so each of the videographers had three or four people with them.

Q. All right. And did you see that—did that include management officials?

A. Yes, it did.

[910] Q. And do you know of something called an observer effect?

A. Yes, I do.

Q. Sometimes known as the Hawthorne effect?

A. Yes, I'm familiar with that concept.

Q. What is that?

A. The concept is based on studies done at Western Electric, Hawthorne plant of Western Electric some time ago and they are classic studies in social science. Basically what the company did was researchers set up a series of experiments and then they manipulated the lighting, they manipulated the amount of attention people were getting from their supervisors, and then they attempted to determine whether these interventions had any impact on productivity and what they concluded was that just the observation of the activity had an impact on the behavior. Okay. So this became known as the Hawthorne effect or the observer effect and the basic idea is that in observing somebody, you alter their behavior or they alter their be—that's a better way of saying it, they alter their behavior in response to being watched, being observed.

Q. What alterations are possible?

A. They could go slower or they could go faster.

Q. If management is watching, what is likely?

MR. MUELLER: Objection. Foundation.

THE COURT: Overruled. Answer the question.

[911] THE WITNESS: Well, I've been doing this for a long time and you can't do a study like this without observing people and when there's people of management, people—along my experience is more people slow up—excuse me, speed up than slow down.

* * * *

Q. All right. The sample sizes, have you formed an opinion about the sufficiency or adequacy of the number of observations in your sample?

A. Yes, I have.

Q. What is your opinion?

A. My samples are large and they're adequate for this kind of a study. My average sample size was 53. That's very large compared to most of the work of this sort that's typically done.

Q. How did someone become a subject on a—one of your video clips? Was it done randomly or how was it done?

A. Well, random is a technical term that statisticians [912] use and what they mean by it is that everybody in the population that you are studying has exactly an equal chance of being included as a subject in the study and the way you would have to go about doing that is you would have to uniquely identify each person in the population and then the easiest way to understand it is put all the names in a hat and pull out the names of your sample and then you would have to identify those individuals and follow only those individuals and collect times on the individuals in the sample.

That's really impossible for me in a situation like this. I don't know who the individuals are, it would take a very, very long time to identify the individuals and follow only the individuals who were in a pre-selected sample like that and so instead of doing that, you can see pretty well from the video clips what we did. On some of these activities we stationed ourselves at the area where the activity was going on and then people would arrive, they would essentially self-select into our study. We weren't picking anybody who we thought was slower or faster, we were taping—taking the people who self-selected to come to that particular work station and do the activity at that work station.

Pretty good examples of that were the hooks outside of the work areas where people had hung their—their equipment and they are going to don it or, you know, after the lunch break or doff it before the lunch break so what we end up with is what [913] I would describe as a representative sample of the people who—who work in that area and perform those activities. Technically speaking it is not a random sample, but it approximates random representation.

Q. Would you say you would ask the person to identify themselves?

A. We filmed and the first usable person, we are going to use that person. If there is more than one usable person in that frame, we will pick whoever we have a starting point for and an ending point for.

Q. Let's take an example of entering the production room floor. How did someone entering the production room floor become a subject to be videotaped?

A. Okay. We did that in two ways. One was to station in those—those areas just outside the door just before they dip the equipment, we're in there and as

they come in we begin the filming process so they self-select and present themselves there and inside the department is very similar, we station at various points within the department where—and we do that in a representative way, we try to cover the department and as people come in and continue their activities, we film the group and select the people who have presented in that particular area, presented themselves in that particular area.

Q. When you say say self-select you don't mean they signed up?

[914] A. No, no, I mean they arrived.

Q. Was there any way at the moment someone would arrive as you turned the camera on for you to know whether they were going to prove to be a fast person or a slow person?

A. No, I had no contact with anybody from this labor force prior to doing this study. I would have no way of knowing that.

Q. What role did your assistants play in the process?

A. In the field work they were doing the same thing that I was doing. They were stationing at various points in the department and filming the workers who presented themselves in the way that I have been describing.

Q. All right. Of the total video clips, do you know approximately how many you yourself were the videographer?

A. It would be approximately one-third, but I did—it is—the videographer is identified and we can tell from the sequence numbers. I could tell you exactly.

Q. That's on that—the spreadsheet shows it?

A. Yeah, the spreadsheet doesn't show it, the body of the report indicates that Gavin Niemi was responsible for tapes one through seven; Childers for eight through 14; and Mericle for 15 through 17. Now, I only did three, but mine were two hours long and theirs were only one hour long so we all shot approximately the same amount of videotape.

* * * *

[916] Q. All right. Now, let's go back to Table 5, we are about done I think, Table 5. We will just take fab first. You [917] have 18 minutes total for these 10 activities. Do you have an opinion about whether that is a fair and reasonable calculation of the time it takes to perform these activities?

A. I do. I believe that that time is fair and reasonable and, in fact, somewhat conservative in terms of the amount of time that is required to do these activities.

Q. And why is it conservative?

A. Because it leaves out certain activities that we talked about before. It doesn't capture any of the walking from the work—very little of the walking from the work station at the break to the point where they doff the equipment.

Q. Doesn't capture any of the hallway time?

A. Doesn't capture the hallway time, activities in the hallway.

Q. Does it capture any bathroom time?

A. No, it doesn't.

Q. Does it capture any—well, strike that. Let's go to Table 6. Have you formed an opinion about the fair and reasonable amount of time it takes to perform these activities in the kill department?

A. Yes, I have.

Q. And what is that opinion?

A. That my opinion is that it takes 21 minutes and—21 and a quarter minute for the donning, doffing, and related work activities.

[918] Q. And what is that based upon?

A. That's based on, you know, my analysis, everything that we have been talking about basically.

Q. And is that a conservative or a liberal estimate?

A. I would make the same statement that I made about fabrication, I believe that it's a fair estimate. It is a bit conservative. I think the—the actual walking probably takes more time than my estimates of the walking and I, you know, because I missed some of the activity, the walking activities.

* * * *

[961] Q. You didn't even study everybody in the plant, right?

A. No.

Q. Okay. And so, in fact, I think you told Mr. Wiggins it would take too long to do that, right?

A. That was a different context so I don't agree with that understanding of my response.

Q. Do you think it is practical to follow employees every day with video cameras, taking them back to a lab, and analyze the numbers for the time they spent on the activities you measured?

A. I can't imagine—I mean, I—practical, it is practical to—if you have a reason for doing it to videotape people.

Q. Is it practical to track all of the employees with video cameras every day?

A. It wasn't practical in the context of this study to do it because—

* * * *

[965] Q. Do you remember getting full schematic diagrams of each floor of the plant?

[966] A. I have never got full schematic diagrams. I got eight and a half by 11 copies of diagrams of each floor at the plant.

Q. They were reduced to fit on a piece of paper, right?

A. I requested full-size drawings of the scale and I didn't receive that.

Q. Okay. What you got, was it sufficient to come up with the walking time number you gave Mr. Wiggins?

A. I chose for practical reasons to accept the company's statement of the walking times—the walking distances, not the walking times. The walking distances.

Q. So you got distance information from the company that you considered sufficient to make your calculations, is that right?

A. Yes.

* * * *

[977] [. .] and I've testified all along here, I have numbers for slaughter and fabrication. Fabrication includes cut.

Q. It also includes retrim, right?

A. Yes.

Q. You lumped cut and retrim together and came up with one number, correct?

A. Yes.

Q. And do you know that within kill, cut, and retrim there are lots of small departments?

A. I think I knew that. There typically are breakdowns of these broad activities.

Q. And you didn't measure each department, did you?

A. No, I did not.

* * * *

[994] Q. I am going to have you take a look from the beginning of your clip as you measured it. Right there. (Indicating) See that woman walking up to the line?

A. Just a second. Is that the starting point? I closed my sheet. What was the number again? 166?

Q. Correct.

MR. MUELLER: Go back a second and freeze it. Stop.

THE WITNESS: So that would be, yes, she's arriving at that particular point in time, she would probably be the first person. I would check the back end to see if that's the specific subject that's associated with sequence number 166.

BY MR. MUELLER:

Q. Do you see that she is inserting her earplugs as she is walking up to the line?

A. I see that, yeah.

Q. Do you see she is carrying some gloves?

A. Yes.

Q. Watch her until the first piece of meat—

MR. WIGGINS: We are going to object, Your Honor. We [995] haven't established that is the subject until we know the end time.

MR. MUELLER: He said it is the subject.

MR. WIGGINS: He said without knowing the end time you can't know which one of these is the one for this clip.

THE COURT: We will assume for the sake of the questions. Just play the clip, please.

BY MR. MUELLER:

Q. So watch the—

A. Your Honor, I am to assume that this individual—

Q. Tell me if I am wrong at the end. We are going to get to the end. Just assume this is your subject. (Indicating)

A. This one? (Indicating)

Q. If you don't remember, tell me when you finally do remember.

A. Can you see the one that I've marked?

Q. Yes. I want you to watch as the meat comes down the line. Let's play the tape. I am going to tell you the meat is going to first come down over here. (Indicating) See that piece?

A. I am sorry, when you say—I'm sorry. I see it, yeah.

Q. That piece? (Indicating) If it helps, watch when she grabs the first piece of meat that she grabs. Go

forward a little bit. Right there. (Indicating) Did you see her grab the [996] meat?

A. Yes, I did.

Q. She is on gang time now, right, because she is working with the meat, right?

A. Can we see some more?

Q. The question is—

THE COURT: Can you answer it?

THE WITNESS: I don't have the information necessary to answer your question. I will try to answer your question, but can I see some more?

* * * *

Q. Okay. Now, let's watch—keep watching the tape. I am going to go look at 6:18:51—actually we may have to go back a little bit. I want you to look two people to her left at this person right here. (Indicating) See this person? (Indicating)

A. Yes.

Q. All right. Watch from 6:18:51 and tell me if the meat gets past him at some point. See the meat here (Indicating) in front of him?

A. I think that's on the other side of this central thing so—

Q. Go ahead. But the meat has come to that position on the line. Do you see it is right in the position where he is?

A. This is the meat that is coming to his position, the piece that is coming right now.

Q. Fair enough. At least by 6:18:57 according to the assumption I gave you, he's paid on gang time, right?

A. No, I don't think so because the meat hasn't arrived at his work station. She may take that first piece. The fellow [1001] back here (Indicating) to her right may take the second piece and there may be a third or fourth piece that eventually gets to him.

Q. Keep watching the line.

A. I disagree with that.

Q. Watch the line. Do you see that piece of meat? Let's say right here at 6:18:57.

A. I am seeing her reaching for it.

Q. Just keeping watching that portion of the line. While this person walks down the line, there's now a bunch of meat coming down the line.

A. She carried it over. There's nothing that reached his work station yet.

Q. It has—

A. According to your definition I think that's where the gang time would have started, at that station, according to your hypothetical.

Q. Where is the guy? He is way down here (Indicating) on the line?

A. Down the line, yes.

Q. Let's keep watching him. Run the tape. He talks to some people, right? Do you see him talking to the line again? Dr. Mericle, did you see him—

A. I'm sorry, yes, I did.

Q. Do you see him come back to his station?

[1002] A. Yes.

Q. Do you see he is still putting on gloves?

A. Yes.

Q. Do you see him adjusting his belly guard? Watch this coming up at 6:19:40. He is going to start adjusting his belly guard. Do you see what he is doing?

A. Yup.

Q. He is pulling it to the right of him, right? Meanwhile meat is going right past where he would have been?

A. So far only three pieces of meat have passed his station.

Q. Because the other workers are carrying the load, right?

A. No, they're—I wouldn't say that that was the case.

Q. All right.

A. You know, it is like I said, at the start the meat comes down intermittently and, you know, there are big spaces in between. Sometimes they let it pass, sometimes they will pull it off and let it sit in front of them for a period of time, sometimes they will put it over and start working on it.

Q. Okay. Let's just go forward a few more seconds.

A. Eventually it is going to get real steady and they will all be working.

Q. Meat is going right past him and he is not touching it, right?

[1003] A. He is still making adjustments I think.

Q. All right. Keep going. Now, under your methodology you would have—if he were one of your subjects

you would have counted all the time we just saw, right?

A. That's correct.

Q. Okay. Can we agree that those two individuals were not fully dressed and ready for work during the period of time you would count in your study? Let me rephrase that. Those two individuals did not arrive at their station early and fully dressed, correct?

A. That's correct.

Q. They waited until there was some meat moving on the line, right?

A. No, they weren't completely dressed before the meat started moving on the line.

Q. Okay. Am I correct that there are a number of instances on your tape of people dressing after the meat is already moving past them?

A. That's correct, because in my tapes I was studying the time for donning and doffing.

Q. Okay.

* * * *

[1008] Q. Okay. Let's go forward and tell me if he is still doing a bunch of donning after the meat is just coming by and piling up at his station.

A. The meat is not piling up at his station.

Q. You have two pieces sitting right off to the side right there, (Indicating) right?

A. It is not piling up. He pulled two pieces of meat over.

Q. Okay. So you agree with me that that donning was happening after the meat had passed his station?

A. Yeah, there were pieces of meat that passed the station and the donning—some of the donning—the tail end portion of the donning occurred after the meat passed the station.

* * * *

[1023] Q. And you based your calculations of walking time on these distances and related diagrams, correct?

A. I—yes, that is correct.

MR. MUELLER: Your Honor, I move in Defendant's 2015.

THE COURT: Received.

BY MR. MUELLER:

Q. Let's show them to the jury now. I have control over that. Let's go back to the first page. So what you learned from this is that Tyson's—somebody at Tyson had done some detailed calculations of how long it took both men and women to walk various distances in the plant, correct?

A. Yes, that's true.

* * * *

[1027] Q. How did you determine the scale? With a wheel?

[1028] A. No.

Q. How did you determine the scale?

A. I took—I measured the distances marked on the print for the walking path, I knew that that distance was the equivalent of what the company had indicated on this table, and I determined the number of feet that was represented by each millimeter of walking distance

based on the straight line walking shown on the diagrams and I derived the scale from that.

Q. I think you told Mr. Wiggins yesterday you considered that reliable, right?

A. Yes, reliable if the diagrams are reliable and if the distances indicated by the company are reliable.

Q. You gave an expert report which you signed believing that it was reliable?

A. Yes.

Q. Okay. So—and then you took—you looked at a book by Niebel, I may have it here, which industrial engineers use some standard numbers for how fast human beings walk, right?

A. Niebel was a reference on walking speed and that is based on years and years of experience in industrial engineering with all kinds of sources for the three mile per hour walking speed.

* * * *

[1032] Q. Okay. And you came up with on the kill side for men, you came up with 3.85 minutes total daily walking time, right?

A. That's correct.

Q. So Tyson's number for the amount of time walking per day is actually higher than your number, isn't it?

A. Very slightly, yes, it was.

Q. All right. For the women, Tyson came up with a number—what was your number? Was yours 3.23?

A. Yes, it was.

Q. Again, Tyson came up with a higher number than you did, right?

A. These—the differences are very small; but yes.

Q. Okay. Now, let's look on the cold side. On the cold [1033] side did you come up with 3.20?

A. Yes, I did.

Q. Your number was slightly higher than Tyson's for the men on the cold side, right?

A. Yes.

Q. And you came up with 2.63 minutes per day for the women to walk on the cold side, right?

A. Yes.

Q. That was slightly higher than what Tyson came up with, right?

A. Yes.

Q. So—but the differences here are fairly small, right?

A. Well, the differences here are more significant. I mean, about a half a minute in each case.

Q. So your number for the men you think Tyson, their walking time calculations are 28 seconds too low per day, right?

A. Yes.

Q. And you thought that we came up with a number that was 29 seconds per day too low for the women, right?

A. Yes.

* * * *

[1035] Q. As we can see, Tyson's numbers were higher than yours on—for men on the kill side, right?

A. Very slightly higher, yes.

Q. And Tyson's numbers were higher for the women on the kill side, right?

A. Yes.

Q. And then you had a 28 second higher number per day for men on the fab side, right?

A. Correct.

[1036] Q. And you had a 29 second higher number for women on the fab side, right?

A. Also correct.

Q. And that is per day, right?

A. Yes.

* * * *

[1037] Q. And at the end of the day you have broken that into three pieces, right?

A. Correct.

Q. Can we pull up Table 6 of his report, the colored version? And you did something very similar on the kill side, right, there's just two activities in the morning and two at the end of the shift, right?

A. Yes.

Q. You have a total of one, two, three, four, five, six activities you measured across the day for donning and doffing, right?

A. Yes.

Q. All right. Now, let's see if we can agree on some basic principles. You didn't measure all of this stuff continuously from the start of the day to the end of the day, right?

A. Well, they don't occur continuously so I couldn't have timed them continuously from the start of the day to the end of the day.

Q. Right. They don't occur continuously, do they?

A. No, of course not.

Q. Okay. And you also didn't follow any one person from [1038] when they first touched anything until they last touched anything at the end of the day, did you?

A. No, I didn't.

Q. In fact, you didn't even follow the same people pre-shift, the people you followed for donning in the locker room are completely different people than the people you measured putting on their equipment in the department, right?

A. Not necessarily completely different. There may be some overlap, but they are different groups of people.

Q. Okay. But more likely than not they're mainly different people, right?

A. Yes.

Q. If you go back to Table 5, that's true of your fabrication measurements too, right, you have only 88 people in—I will say 88 people in the locker room donning pre-shift, right?

A. Yes.

Q. But when you get to the department, you only have 23 fabrication employees you measured, right?

A. That's correct.

Q. So it is either a small subset of the people you found in the locker room or just a totally different group of people, right?

A. Yes, I just would repeat my previous answer to that. There may be some of the 88 in the 23.

[1039] Q. The same at the end of the shift, you got different numbers because you can't say that these are the same people you are following?

A. I never made that claim.

Q. Okay. I know, but can you answer my question? They're not the same people, right, you can't say that, right?

A. I think I answered that. There may be some of the same people. By and large they are not the same people.

Q. Okay. Now, at least in some other cases you actually have followed the same people from the time they first touched until they got to their line, right?

A. I may have done that, yes.

Q. Actually you did do it at a company called George's Poultry, right, you filmed the employees continuously from the time they entered the building until the time they were at their work station ready to perform work, is that right?

A. I think that is correct.

Q. You did not do that here, right?

A. No.

Q. Now, same thing at the end, you didn't follow anybody from when the line stopped until they disposed of their laundry bag, did you?

A. No, I did not.

* * * *

[1050] Q. Okay. Very good. Now, you also didn't break it down between knife users and non-knife users, right, you just lumped everybody together, right?

A. I didn't differentiate between knife users and non-knife users, no.

Q. So you cannot tell us how long it takes to put on just what we call the standard items that are worn by the people who don't use knives, correct?

A. I don't think I could resort the data to find that out. I think I would have to go back to the source tapes and make a decision about each individual, whether they are knife users or not knife users. There's nothing in my report that divides them in that way.

Q. Actually when you look at people, in some parts of your tape there's just no way you are going to be able to tell [1051] if they're a knife user, right?

A. I don't know the answer to that question because I haven't done that activity.

* * * *

[1064] Q. Okay. Now, when you got to our plant, you got there in April of '09, right?

A. That's correct.

Q. And you wrote the report in June of '09, right?

A. That's correct.

Q. That was the first report—the first report in your career in which all of a sudden you stopped any individual [1065] measurement in your report of individual pieces of clothing or equipment, right?

A. I think that's probably the first time that I—that I defined broad activities and measured only the broad activity, yes. The previous studies had measured broad activities and then in the analysis phase broken them down into smaller activities.

Q. Right. And that's the first time you worked with these lawyers, correct?

A. Yes, I think it was, yeah.

* * *

[1104] Q. Dr. Mericle, I want to ask you some questions about random sampling. It has been suggested in this courtroom by someone that you filmed people as they came out, that you didn't choose who came out first, just filmed them as they came out of the locker room and that that was supposedly completely random. Here is my question: First of all, you didn't film anybody as they were coming out of the locker room, correct?

A. I think that's correct.

Q. Okay. So the only place you were selecting people related to the locker room was when they came into the locker room, correct?

A. The only—I am sorry, repeat the first part of that question.

Q. When it comes to locker room related activities—

A. Yes.

Q. —you were filming people as they came into the locker room, correct?

A. That's correct.

Q. And if you look at your report, am I correct the word random does not appear anywhere in there?

A. I think you're correct. I don't recall using the word random in my report.

Q. Am I correct that if I look at your report, we are not [1105] going to see any statement by you that what you did was representative of all the people at the plant? The word representative is not in there, is it?

A. I don't know the answer to that question.

Q. You can look at it. What is it, two pages, three pages?

A. I don't see that word in the narrative portion of my report.

Q. Just so the jury understands, when you study a group of people, that big group is called a population, right?

A. Yes.

Q. And because it is not usually possible to study everybody in the population, you study a smaller number of people, right?

A. Yes.

Q. And that's called the sample, is that right?

A. Yes.

Q. And the goal is to try and select that—the people in the sample so that they're representative of the bigger group, the population, correct?

A. Also correct.

Q. And for that to be random, everybody in the population must have an equal probability of being selected for the sample, correct?

A. Yes.

[1106] Q. And here you cannot say that everybody had an equal probability of being selected for your study, can you?

A. That's correct, and I think it is not really possible to do that under the constraints that I operated.

Q. Right, and so you did not do a random sample, did you?

A. My sample does not meet the technical definition of a random sample.

Q. Thank you. In fact, you have no way of testing to determine if the people you selected for your study took more or less time than if you had done a pure random sample, correct?

A. I have no way—well, I suppose the way of doing it would be to do a study that was based on random sampling and then compare that to the results of my study so I think the answer is yes, I could do that; but not under the constraints of this procedure.

Q. And that's a hunch, right?

A. No, it is not a hunch.

Q. Do you remember telling me that you didn't have any way of testing statistically, your study was random?

A. I would need to see the context of that question to be able to respond.

Q. Take a look at the bottom of 216 in your deposition, carrying over to the top of page 217. Do you see I was asking you—

A. Could you give me a moment?

[1107] Q. Just read to yourself.

A. Let me read to get the context here.

Q. Do you remember at the bottom of page 216, starting at line 14, I was just asking the question of if there had been any bias built into your selection process that would have caused you to focus on people who were taking more time than the average employee doing the activity. Do you see that?

A. I am not sure what you are referring to. I don't see those—that line of questioning right here.

Q. Are you reading your deposition in this case? What do you have on the front cover? What does that say?

A. Bouaphakeo depo, page 216

Q. Yeah, do you see at the bottom, line 17, you say, "I don't think so?"

A. That's says, "I don't think so."

Q. Just read to yourself. Just read to yourself to see if it refreshes your memory.

A. I say that, "I don't think there's any—"

Q. That is not the question. I asked you whether—you were saying that you didn't think there was any bias built into your selection process, right?

A. Yes, that's about what I was going to answer.

Q. Okay. Now, then, this happened. I asked you, question—

A. I'm sorry?

[1108] Q. I am sorry, I asked you then a question about it, right and I said, "That is a hunch, right, you don't have a statistical basis to say that?" Answer, "No, I don't know of any way you can test that statistically," is that right?

A. That was in reference to that whole—that whole statement.

Q. Okay. Now, I am going to ask you about—let's pull up table—we don't have to pull it up. Remember we keep seeing Table 5 and 6, you measured a bunch of people in fabrication, right?

A. I measured a bunch of people in fabrication.

Q. And you measured a bunch of people in kill, that is Table 6, right?

A. Correct.

Q. All your numbers in this case come down to whether you were right about saying hey, that's a fabrication employee or that's a kill employee, right?

A. No, I wouldn't agree with that.

Q. The whole point of your study was to come up with one number for fabrication and one number for kill, right?

A. I do present numbers for fabrication and kill, yes.

Q. And the way you did that is you looked at people and you made a guess as to whether they worked in fabrication or kill, right?

A. I made a decision to classify them as fabrication or [1109] kill.

Q. And based solely on the time of the day or what you thought they had put on, correct?

A. Based on those two factors, the time of the day, the shift started at different times, and the equipment and the equipment is different, so yes, based on those two factors.

Q. The time of the day turned out to be not very helpful because a lot people come in at the same time of the day, correct?

A. There's significant separation for most of the people.

Q. You agree there are kill people in your study who are in the locker room at the same time as fabrication employees, right?

A. Correct.

Q. Okay. So time alone doesn't answer this question, right?

A. No, time alone doesn't. Time gives you some guidance and then with that—within that guidance the analysis of the equipment that they are wearing I think allows you in most circumstances to make the correct decision as to whether they are kill or fabrication.

* * * *

[1140] Q. Let's go to the next page. On the kill side you simply have—four of your six measurements are under a minute, right? Do you agree with that?

A. Four of the minimum numbers.

Q. Yes.

A. When you say my measurements, you are talking about the shortest observed time which is one out of, you know, the whole sample and—

[1141] Q. Right. So pre-shift—

A. Four of them are less than a minute, yes.

Q. Four of them you found somebody took less than a minute to put on their equipment in the department, right?

A. Yes.

Q. You found one that took less than 30 seconds that took off their equipment to go to lunch?

A. Yes.

Q. Somebody else it took exactly 30 seconds to put it back on after lunch?

A. Also true.

Q. And you found somebody that took 12 seconds to put it on—I am sorry, to take off their stuff at the end of the shift, right?

A. Yes.

Q. Okay. Now, let's go back to the first page. For each of these there's somebody who takes a lot longer than that to do the same activity, right?

A. Yes.

Q. And the reason for that is they're not really the same activity, right?

A. They're the same activity, the specific equipment that they don and doff varies.

Q. Right. I am going to come back to this later, but there can be other reasons for the differences here, right?

[1142] A. Yes.

Q. You found somebody who took—let's take .583, you found somebody else who took 10.333 minutes to do that, right?

A. Yes.

Q. How much longer did it take this person (Indicating) than this person? (Indicating) Do you have a calculator there?

A. Sure.

Q. I mean multiple, I don't mean just how many minutes more. How much longer—

A. I do not have calculator.

Q. You do not have a calculator?

A. I had one earlier, but you apparently took it out over the lunch break. Thank you. The answer to the first is about—about 18 times longer.

Q. So this person's (Indicating) 18 times longer or slower, however you want to call it, than somebody else you measured doing the same activity in the locker room for fabrication, right?

A. That's correct.

MR. WIGGINS: Object to the form of the question. It is not the same activity.

THE COURT: Overruled. Overruled. It is cross-examination. You can ask him that.

BY MR. MUELLER:

Q. Let me follow up on Mr. Wiggins' point. Do you agree [1143] with your counsel they are not the same activity, are they?

A. They're the same activity as I've defined them for the study and the content of the activity between the two subjects is different because of the different equipment that they're wearing.

Q. Or different amounts of time talking to their friends, right?

A. Could be that.

Q. Or it could be combing their hair, right?

A. No, the combing of the hair I don't think would have any significant impact so it's really pretty much irrelevant.

Q. Or it could be dancing in the aisles, right?

A. Likewise with that.

Q. Okay. Or it could be sitting on a bench, right?

A. Could be that.

Q. Or it could be standing doing nothing, right?

A. People stand to do nothing from time to time.

Q. All of these things could explain why you have some numbers that are much higher than the short numbers, right?

A. All of them could contribute, but I think most of them are not very important in terms of explaining the differences.

Q. When you told Mr. Wiggins that all your clips are representative, that means that even these short clips are representative as you use that word, right?

A. When I use the term representative, I'm talking about [1144] the group of people who I'm studying and each and every one of these clips represents an individual who did the activity. Some of them stood around,

some of them put on more equipment than others, each of them contributed to the average that I used so their—first representative is used in the context of the sample and second, if it is applied to the individuals, it is—it is representative in the sense that all of them did the activity. It is on film.

Q. Are the short clips representative?

A. The short clips are representative of the individual who performed the—that activity in that way at that time.

Q. Okay. Now, yesterday Mr. Wiggins asked you a question and you said, "Most people cluster around the average." Do you remember saying that?

A. I'm sorry. I was getting a drink. Could you please repeat the question?

Q. Do you remember telling, when Mr. Wiggins was asking you questions yesterday, do you remember saying that, "Most people cluster around the average?"

A. Yes.

Q. Okay. You didn't say that in your report, right?

A. No.

Q. You didn't do any statistical test for that, did you?

A. No, I didn't.

Q. You can check that by putting out a scatter plot chart [1145] and put out a little dot for each observation and you can do that to compare each other?

A. I can do that.

Q. You didn't do that?

A. I don't have to do that. All I have to do is look at the sorted data and it is perfectly obvious from the sorted data.

Q. So you did not do that?

A. No.

* * * *

[1157] Q. Okay. Let's bring up your Table 1, just show it on the screen. This is in Deposition Exhibit—it is Deposition Exhibit 5. I am going to wrap this up. You have 744 different numbers virtually all of which are different, correct?

A. Yes.

Q. You have different numbers for every single person your team measured, right?

A. Yes.

Q. And you have already told me that this is not standardized repetitive work, right?

A. That's correct.

Q. And the reason people take varying amounts of time to [1158] do what you call the same activity is they're not really doing the same thing, right?

A. But this is kind of a word game. They're doing the same activity, but there's a lot of variation within the activity. I will concede that.

Q. Okay. There's a lot of variation, right?

A. Yes.

Q. And part of the reason there's variation is a lot of the people are wearing completely different combinations of clothing, right?

A. No, no, that is not true. The—these people have a lot of commonality when it comes to the—to the equipment that they are wearing to perform their work.

Q. One of the reasons for the difference in times is different combinations of clothing, right?

A. Yes.

Q. And one of the reasons is that they have different personal speeds, right?

A. Different personal speeds, yes.

Q. And some of that may be due to experience, right?

A. Yes.

Q. Some of that I think Mr. Wiggins used the word arthritis, could be due to physical limitations, right?

A. Could be, yes.

Q. Some of it could be just their choice, right?

[1159] A. Could be.

Q. And you even have different times for employees who wear the same clothing, correct?

A. Of course, yes.

Q. And you also observed it takes different amounts of time to wash the same equipment, right?

A. It can be dirtier or cleaner, yes.

Q. And it could be that the employee chooses to spend more time cleaning it, right?

A. Some people are very meticulous, other people are more casual about cleaning things. They're all responsible for delivering clean equipment back to their lockers; but some people as a matter of personality I guess are more meticulous about that, yes.

Q. Employees have different routines for dressing, right?

A. They do, yes.

Q. That's true before shift and after shift, right?

A. Yes.

Q. Now, you also observed that some people would put on their mesh items in the locker room and other people would carry it out, right?

A. Yes, they—there are different combinations of donning in the locker room versus donning in the hallways or at the work site.

Q. So they don't all put on their mesh in the locker [1160] room, correct?

A. That's correct.

Q. And they all don't put on their sanitary items in the locker room, do they?

A. Do you want to list the sanitary items for me?

Q. Let's say frock, they can grab their frock and go put it on out in the cafeteria, right?

A. I didn't see a lot of that. You mentioned that, but I suppose they could.

Q. Okay. And they could put on their hair net out in the cafeteria, right?

A. Again, I didn't see a lot of that; but sure, they could.

Q. And they could put their belly guard and their scabbards on in the department or in the locker room, right?

A. Yes.

Q. And some employees might put on their—some of their sanitary items before they put on their unique knife-related items, right? You can put on your hair net—

A. Yes, I was just thinking a little bit, yes, the answer is yes.

Q. All that is true in reverse at the end of the shift, right, you can take off your mesh items and take off your hair net last, right?

A. I don't think you can take your mesh off last because [1161] usually you have to verify that it is clean, you have to do some cleaning on the mesh.

Q. I said it the other way around, you can take off your mesh and then take off your hair net, right?

A. Yes.

Q. And you could—the last thing you do could be taking off some sanitary item like the hair net, right?

A. That could be, sure.

Q. And you don't know why people do it in all the different places they do, right?

A. No, not—no, I don't.

Q. You just know there's variation, right?

A. Yes.

Q. And in addition to all that, different employees spend different amounts of time talking to each other or doing personal activities, right?

A. Yes.

Q. So what we've learned from your study is that everyone has different times and there could be all kinds of reasons for that, correct?

A. Yes. We've also learned from my studies that there is–

Q. You have answered my question.

A. Yes.

Q. You have no way of knowing why everyone is different, [1162] do you?

A. Sure, I have ways of knowing what accounts for these differences.

Q. It includes differences in equipment, right?

A. Yes.

Q. Differences in physical abilities?

A. Yes.

Q. Differences in choices?

A. Yes.

Q. And differences in personal activities interspersed between what you measured, right?

A. Yes.

* * * *

[1163] Q. For these activities that Mr. Mueller says are so different for all these different reasons, what does Tyson pay for those activities?

A. Four minutes.

Q. Does it change it from one person to another?

A. No.

Q. If it had a time clock, a punch clock, would that enable it to treat different people in different ways?

MR. MUELLER: Objection. Beyond the scope of his report. Not disclosed.

THE COURT: Overruled. Answer the question.

THE WITNESS: There are alternatives I've witnessed in other plants, yeah, there are different ways you can pay people for this activity.

* * * *

[1164] Q. Now, you said there was—a minute ago there's a lot of commonality in the items people wear. What do you base that on?

A. Well, I've seen reports that list the—list the items that people wear by job classification.

Q. All right. And have you—what did you learn from that?

A. What I learned is that 92 percent of the people wear the Plexiglass cuff, 91 percent of the people wear mesh gloves, [1165] 88 percent of the people wear—use the steel, about 63 percent of the people wear Polar sleeves, about 60 percent of the people wear Polar gloves, 84 percent of the people wear belly plates.

Q. How many? What number did you say?

A. 84 percent and—so there's, you know, there is a lot of commonality in terms of the equipment.

Q. Now, you have told us that you had 744 clips, correct?

A. Yes.

Q. And we've been calling those sequences and we have seen a lot of them, correct?

A. Yes.

Q. All right. Now, of those 744 clips, how much time are there observations on those clips?

A. 1,551 minutes.

Q. How many seconds is that?

A. 93,060 seconds.

* * * *

[1166] Q. What is the likelihood that someone talking to a friend for 10 or 15 seconds would affect your averages given that you have 93,060 seconds?

A. Well, the impact on the averages would be very, very small.

Q. Just to change—let's take the fab department. You said 18 minutes was the average. Just to change the fab department by one minute, to lower it to 17 minutes, how many seconds would it take for you to throw out?

A. Well, it would take about—let me—about—probably about 5,000 seconds.

Q. And what do you base that upon?

A. To lower it by one minute is five—approximately 5.6 percent reduction. In other words, to move from 18 minutes to 17 minutes, that's about a five percent reduction in time so if I apply that same five percent reduction to the 93,060 seconds, that's, you know, I can do the exact numbers for you, but it is ball park about five to 6,000 seconds.

* * * *

[1170] Q. Now, we were talking here at the board about what it would take to move these numbers, move these averages by a minute and we had established that it would take around 5,000 seconds to come out to move it one minute. How many minutes is 5,000 seconds?

A. 83.33 and a third minutes.

Q. 83.33?

A. Yes.

[1171] Q. To change the average by one minute, correct?

A. That's correct.

* * * *

[1176] Q. Let me go about this a different way. In the industrial engineering--you can take that down—field, is there a way to decide when you've got outliers?

A. You can perform statistical tests to determine whether there are outliers.

Q. And Mr. Mueller had asked you about that and when you—tell us how that—first of all, have you performed that test?

A. Yeah, I performed the test called the 1.5 IQR test, it is a common test used, that is used for identifying outliers and base—

Q. Okay. Now, did you, in fact, through that test identify what is called outliers?

MR. MUELLER: Objection. Your Honor, this is undisclosed expert report testimony. It was not in his report and it was not in his deposition. He is talking about something he's done since discovery.

[1177] MR. WIGGINS: It is direct—he was asked about it, several questions.

THE COURT: Overruled. Answer the question.

BY MR. WIGGINS:

Q. Did you—

A. Yes, I did, I identified the outliers and I determined what impact they would have on the overall average times.

Q. Okay. And if you were to take each of those outliers identified through that test, the 1.5 IQR test, how much effect would it have on the kill department?

A. On the kill department, it would reduce the average by .4 minutes from about—from 21.25 to about 20.83, 8384.

Q. Four minutes is—

A. A little bit more than .4 minutes.

Q. What is .4 minutes?

A. .4 minutes is 24 seconds.

Q. 24 seconds. All right. You threw out all the outliers, that could be identified through the standard test, you would reduce the time 24 seconds?

A. That's correct.

Q. And in the fab department, if you were to take all the outliers, cut 100 percent of them out, what effect would it have?

A. The impact was larger in the fab department, the total impact was over one minute. It dropped the average from 18 [1178] minutes down to 16.73 minutes.

Q. Okay. And tell us how industrial engineers calculate the 1.5 IQR test to spot outliers and their effect.

A. The—the test—this is a little bit complicated. You take each of the activities and you sort them from small to high and then you find the middle observation, the median observation and then you take the bottom half and divide it in half. That identifies the first quartile and you take the top half and divide it in half, that identifies the third quartile. The difference between the third and the first quartile is the IQR, the interquartile ratio. Multiply that by 1.5 and then add it to the third quartile and any number in the sample that's larger than that is an outlier.

Q. All right. Now, let's look at Mr. Mueller's table that he put on the board, I don't remember the name of it. Remember the one that said wide variances? The one he showed you this afternoon. Do you remember this?

A. Yes, I do.

Q. Now, first of all, let's get it oriented. When we look at the first line as an example, pre-shift don equipment at locker, when we see a .583, is that a single person or is that an average?

A. That's a single person.

Q. When we look at 10.33, is that a single person?

A. Single person.

[1179] Q. All right. So he's taken the—one individual that's the shortest and one individual that's the longest apparently, correct?

A. That's correct.

Q. Now, the one 1.5 IQR, can it identify whether or not either one of those are outliers?

MR. MUELLER: Objection. Leading.

THE COURT: He said can it. Overruled.

THE WITNESS: Yes, it can. When you apply the test, you can determine whether there are outliers and you can determine whether these individual observations are outliers.

BY MR. WIGGINS:

Q. Okay. And did you, in fact, determine that one of those two in the fist line is an outlier?

A. I determined all of the outliers, I identified all of the outliers.

Q. Okay. Were all of them outliers or just some of them?

A. Oh, just on this—on this sheet right here?

Q. Yes.

A. Just some of them.

Q. These are 16 people, correct, on this chart?

A. That's correct.

Q. I want to—first let's get the—take the first line. Which one of those two, or maybe both, did you determine are outliers under 1.5 IQR?

[1180] A. I can—of the first two, my recollection is that the long observed time, the slow time was an outlier. None of the short times were outliers.

Q. Okay.

A. That's the problem with the test. It identifies on this kind of data slow times that are outliers, but it doesn't really identify any short times.

Q. And if you don't identify short time outliers, who—to whose advantage is that? The company or the employees'?

A. Well, it takes out the slow times and it leaves in all of the fast times so that's in the company's interest or to the advantage of the company.

Q. Now, we are going to come back to that problem with the test, but at least as a test of throwing out the longer times, that would be the right-hand column. Which one of these, if you recall, eight individuals were determined to be outliers?

A. Well, the 10.333 was an outlier; the 9.267 was an outlier; and the others I honestly—I would have to go back to the analysis and look at it to tell you which the—which the—I believe there was at least one additional outlier, but I don't recall which one it was.

* * * *

[1203] Q. Now, if you—if someone were to take your tapes, could they, if they wanted to, such as the Tyson industrial engineers, break out elements as you did in those two cases?

A. Yes, I think—and people have done that in, you know, past cases that I've been involved in, the company has hired engineers to come in and frequently they will take my data and re-analyze it.

* * * *

[1215] Q. And you were asked some questions about taking out—not just in the Kraft case, but generally under industrial engineer principles, taking out certainly personal time activities. I think Mr. Mueller mentioned getting a drink of water and things like that. Do you recall that testimony?

A. Yes.

Q. Okay. Now, under the principles of your profession, if you take out personal time, do you put back in anything in replacement of it?

A. Yes, you do. When we talk about taking out time, basically what you are saying is that you isolate the time for those personal activities that occurred during a study and in computing the work time, you don't include those personal times. You arrive then at a kind of pure work time which industrial engineers refer to as normal time; but then to make that normal time fair, the engineer adds what is called allowance time and allowance time, you know, I have mentioned before, is time for personal needs, time for making up for time that you lose because of unavoidable delays and time for fatigue to overcome the fatiguing aspects of work so all of that is added back in again.

Q. All right. And is there a standard that industrial engineers use to account for these type of what I would call intangibles?

A. Yes, the textbooks will all have a chapter on [1216] allowance, every one of these textbooks that we have mentioned, and they will talk about the importance of including the allowance in the standard time and they generally will mention in percentage terms, you know, approximately how large those allowances would be or at least some comment on the range of allowances that are typical in industry.

Q. All right. And what is that range?

A. Oh, you know, it depends on the textbook, I think most of them will cite figures between 10 and 15 percent and they will also talk about the need for more

allowances if the work demands it or less if the work is particularly less demanding.

Q. All right. Let me show you just one example that I happen to know about. I don't know all these texts, but I saw this, we looked at it earlier. This is the one that we were reading from before. Look at the last paragraph. It says, "In general, a fair day's work is one that is fair to both the company and the employee. This means that the employee should give a full day's work for the time that he or she gets paid, with reasonable allowances for personal delays, unavoidable delays, and fatigue," correct?

A. That's what I'm talking about, yes, it is the adding back—that time back in.

Q. Now, in your professional experience and opinion, how much time should be added back in if you are going to take these other things out that Mr. Mueller wants to take out?

[1217] MR. MUELLER: Objection. I think he is really getting at a legal conclusion for the jury.

THE COURT: Absolutely. This is—this is in an industrial engineer's textbook and I don't have any problem with him having it in a textbook, but now this is my area is to tell you what the law is and what industrial—they tell industrial engineers in college or in the workplace about—about what is fair in terms of compensation is not the standard here. The law says specifically and you will get more than enough instruction on what the law says is permissible for compensation. Objection sustained.

BY MR. WIGGINS:

Q. But let me ask you this question from a standpoint of just strictly the time study of the type we have

here today. If we're going to take out those 24 seconds and those 76 seconds on that board right there, under the principles of your profession should we put back in the allowance time?

A. Yes, we should.

Q. And how much time in your opinion should we put back in?

A. Well, it would be much larger than the 24 seconds and the 76 seconds on the board. Typically what would go back in is about 10 percent of the work time, pure work time.

Q. Did you say a percentage? I didn't hear you.

A. 10 percent.

[1218] Q. 10 percent. How much would 10 percent of 18 minutes be?

A. 1.8 minutes.

Q. And how much would 10 percent of 21.25 minutes for the kill department be?

A. That would be, you know, 2.125 minutes.

Q. Did you—did you do that in this case, did you—the word was used charge to the company, did you charge to the company that type of add back in time?

A. No, but I didn't take the time out either in fairness.

Q. And in your opinion what effect do those two items have on each other?

A. Well, you know, I think if I had taken all the items out and then put 10 percent back in again, I would end up with times that are larger than 21.25 and 18.0.

* * * *

[1234] Q. Yesterday you had told us about the industrial engineer's way of identifying outliers and we had talked about it there on the board. I want to go back to one question on that that I overlooked. You referred us to the fact that 1.5 IQR has a bias to it of some kind. What were you referring to?

A. What I was referring to was the fact that a test like this would favor the company in applying to this kind of time study data and the reason for that is that the test eliminates outliers among the slow subjects, but it doesn't among the fast subjects so it is cutting off one end of the distribution, but it is not really cutting off the other end.

* * * *

[1261] LIESL FOX,

witness herein, called as a witness by the Plaintiffs, after having been first duly sworn, was examined and testified as [1262] follows:

EXAMINATION

BY MR. WIGGINS:

Q. Good morning.

A. Morning.

Q. State your name, please.

A. Liesl Fox.

THE COURT: Get a little closer to the microphones and you can pull them your direction. That will help.

BY MR. WIGGINS:

Q. Ms. Fox, Mrs. Fox, can you give us your educational background?

A. I have a Bachelor's Degree in mathematics and a Master's and a Doctorate in biostatistics.

Q. All right. And when did you receive your Ph.D. in biostatistics?

A. In 1997 I believe.

Q. From what institution did you receive that Doctoral Degree?

A. University of Alabama at Birmingham.

Q. All right. And when did you receive your degree in mathematics?

A. 1992.

Q. All right. And what—what has been your career since receiving your Doctoral Degree in biostatistics?

[1263] A. I'm a statistical consultant at Quantitative Research Associates.

Q. And how big an outfit is that?

A. It's small, it is my employer and myself.

Q. You're an employee?

A. Yes.

Q. Okay. And what do you do in your job?

A. We do a lot of statistical support, we do a lot with legal work, we do some other medical or—not medical, but other research support as well.

* * * *

[1264] Q. Okay. And did I ask you to help us with handling Tyson's database of their employment records for this case?

A. Yes.

Q. And did you do that?

A. Yes.

Q. And what databases did you give us help with in handling?

A. In this particular case I was given punch data records and pay records.

Q. All right. Punch data, are you talking about time clock, punch in, punch out?

A. Yes.

Q. Payroll records, what type of records did you have there?

A. That particular database had the departments and the job codes that were being worked, the particular code regarding the type of work that was being done, whether it was regular work, a meeting, a training shift or whatever, it had a time on it, the start time of each specific task that was done during the day, it had pay rates. There may have been some other [1265] fields, but those—I think those were what I was concerned with.

* * * *

[1266] Q. What did you do?

A. I was asked to compute damages for uncompensated time worked.

Q. Damages being backpay?

A. Yes.

Q. Did you include anything other than pay?

A. No.

Q. All right. And tell us how you went about calculating [1267] backpay.

A. Well, for each individual there's a definite liability period depending on the class that they're in so for during that liability period I would look at the number of days that they actually worked during the week, I would use an estimated amount of off-the-clock time worked per day or per shift. When I had that totaled for the week, I subtracted off the amount of K-code time that had already been paid to the employees that was shown in the pay database and came up with a total amount of uncompensated time worked.

Q. Okay. So essentially it sounds as if you built a database that would tell us which days people worked and how much they got paid for those days?

A. Correct.

Q. All right. Now, did you do that on a person-by-person basis?

A. Yes.

Q. Did you do it on a day-by-day basis?

A. Yes.

Q. If a person was absent on a particular day, did they get—did that day get included in their backpay?

A. No.

Q. Did you do it on a week-by-week basis in terms of which weeks they worked over 40 and which weeks they worked under 40 hours?

[1268] A. Yes.

Q. Let's say they came in on Monday and were absent the rest of the week, they just had an eight or nine-hour day, did they get any backpay for that week?

A. No.

Q. Now, you said you then used the company records for K-code. What is K-code?

A. It's a specific line item in the pay data, it is paid only on Saturday of the week, the cost code is the letter K in the data and it is my understanding that that is to compensate for I guess the donning and doffing that's relevant in this case.

Q. Okay. And once you used the company data to figure out which days people were at work, which weeks they worked over 40 or under 40, what did you do next?

A. Well, I would have—since I only used what was overtime, I would have multiplied that remaining amount by their time and a half pay rate for overtime rate of pay and then I just added it up for each person, came up with the total amount of damages.

Q. So the K-code was the actual amount of time—of pay that was paid each week to a particular person?

A. In the pay data, yes.

Q. And that came directly from Tyson?

A. Yes.

[1269] Q. You didn't have to do anything to that element, did you?

A. No.

Q. And the days that they actually were at work or absent, did you have to do anything other than that other than take Tyson's records at face value?

A. No.

Q. And for the weeks that they worked over 40 hours or under 40 hours, did you have to do anything other than just take Tyson's record and use it as is?

A. That's correct, I used specific cost codes for that, I think that there were—there were some cost codes, you know, like holiday pay, there were certain cost codes that indicated they were not actually at work on the job.

Q. From Tyson's own records were you able to tell how much to subtract as already having been paid?

A. Yes.

Q. Now, how did you determine the other side of the equation about what they may should have been paid?

A. I did that with specific departments, it was limited to what is being called the kill and the fabrication departments, and then there were specific job codes within those departments that had to have been worked so using those specific departments and specific job codes, I applied the estimated off the time—off-the-clock amount of minutes.

[1270] Q. Where did the estimated off-the-clock minutes come from?

A. Dr. Mericle.

Q. All right. And what amounts of time did you use on that side of the equation to see—to compare what they should have been minus what they were paid?

A. I believe it's 18 minutes for fabrication and 21 and a quarter for the kill department.

Q. All right. Did—were you able to determine from Tyson's own records which employees Tyson had determined to be eligible for these type of pre-shift and post-shift donning and doffing payments?

A. Not exactly. K-code time in the pay data is recorded only on Saturday and it is recorded as a lump sum so I—I did not know specifically which day or which job they were being paid for, I just assumed that they were being paid for the gang time jobs in the appropriate departments.

Q. And was there a period of time where the payment was a flat rate for everybody that was eligible for K-code that did donning and doffing?

A. Yes, that was prior to February of '07 I believe.

Q. And what was that amount that was a flat rate?

A. That was four minutes.

* * * *

[1271] Q. All right. Now, the 3,344, that covers all the employees at the plant that are paid by gang time and are subject to the practice at issue in this case?

A. Well, that's—it's limited to people who worked a gang time job so at least one shift they worked a gang time job within that specific liability period, I can't remember, 2005 to 2007 or something like that, they had to have worked at least one gang time job during that period of time.

[1272] Q. Okay. These 3,344 all satisfied that test?

A. Yes.

Q. All right. And has the company now checked your work and agreed that that is the correct number of people?

A. I have not heard otherwise. I assume so.

* * * *

[1275] Q. And let me show you just one page of a many-page exhibit just so we are on the same page. This is page one for [1276] the FLSA class. It gives person by person and amount, correct?

A. Correct.

Q. And for example, the first person, Jose D. Acevedo, $220, then it goes on up, correct?

A. Correct.

Q. For that particular group did you limit them to persons that made—that their backpay was of a certain magnitude or amount?

A. Yes, damages were only awarded if they would receive at least $50.

Q. At least $50. Okay. Let me show you the last page. Well, I won't do it. This is not sorted. So from this work you did you were able to determine for particular people what their loss was?

A. Yes.

Q. And tell us the types of variables that would cause some people to be on the low end and other people to be up on a higher end of the backpay amounts.

A. Part of it is length of time that they worked. Obviously if they only worked a couple weeks, they would not be entitled to much in the amount of damages. Damages are only eligible to be computed if they—if it would put them into overtime so if even adding this extra uncompensated time did not result in over 40 hours for the week, then they would not get damages for that week. They had to have worked at least close [1277] to a full-time week to get damages and obviously the more—the more gang time jobs that they worked

during the week, the more uncompensated time would be added to their total.

* * * *

Q. Now, taking the total amount, not the individual amounts, but the total amount, when you put all the individuals that are eligible together for the Iowa class, what backpay did you calculate?

A. Six point—$6,686,082.36.

[1278] Q. How many cents?

A. 36.

Q. All right. Let me show you the summary—what is the next number, 345—table. Are these the results of your calculation based on the method you told us about?

A. Yes.

Q. All right. And you—I notice that you said number in the Iowa class is 2,850. Why is that less than 3,344?

A. Because that—that subtracts off the people that would not get any because they would have received less than $50.

Q. Even using Dr. Mericle's times they would receive less than $50?

A. It—well, yes.

* * * *

[1279] Q. And did you include interest?

A. No.

Q. So this is just the pay itself, correct?

A. Correct.

Q. Now, in doing this, did you have to build a computer program in order to run the calculations for you?

A. Yes.

Q. And have you shared that program with the company?

A. Yes.

Q. And are you able from your program to simply change the assumption based on Dr. Mericle's times?

A. Yes, if it is to be applied to areas overall such as on fabrication or kill.

Q. Now, let's just take a hypothetical. Let's say that someone were to say well, I think 18 minutes is not the right number, but I think 15 minutes is about the right number just to [1280] pick a number out of the sky. Is your program able to substitute 15 for 18 and then give us the new number?

A. Yes.

Q. And is that—how long would it take to refigure if you changed that one variable?

A. Running on a laptop, probably about 10 minutes.

Q. All right. And just so we don't have to do it here in the courtroom, have you done that 10-minute exercise at a lower amount of time than 18 minutes and 21 minutes?

A. Yes.

Q. Let's take the example I just gave you. Have you already checked to see what the backpay would be if someone were to just pluck out of the sky 15 minutes for fab and less than—six minutes less for kill?

A. I actually did 15 minutes for both fabrication and kill together.

Q. Okay. And what backpay did you get when you your formula ran that?

A. For the Iowa class, it's $4,903,621.51.

Q. All right. I am not good at writing these numbers down. Four million, what?

A. 903,621.51.

Q. All right. And for the FLSA class?

A. $1,184,227.26.

Q. All right. Now, is the formula and the data used in [1281] applying the formula exactly the same whether you run a 15 minute or an 18-minute calculation?

A. Yes.

Q. Is it exactly the same if you ran a 15 minute and a 12-minute calculation?

A. Yes.

Q. Any number you plug in on the right-hand side of the equation, the should-have-been side, the formula just automatically changes person by person?

A. Yes.

Q. And let's just take the 15-minute calculation that you did as an example. Does it automatically print for you a person-by-person list of the amount each person gets based on the days they worked and the weeks they worked over 40?

A. Yes.

Q. And even that part of it, doing several thousand people's calculations with a new number, that just takes about 10 minutes?

A. Yes.

Q. And do you have that formula and that data that allows that calculation to be made in your computer?

A. Yes.

* * * *

[1283] Q. Is this Exhibit 346 looking at just that one [1284] component, the walking component?

A. Yes.

Q. What was the backpay just for that one subpart?

A. For the Iowa class $413,434.71.

Q. All right. And then the FLSA class was?

A. $127,895.91.

Q. And again, there's overlap between those two, correct?

A. Yes.

Q. You don't just add them?

A. No, you cannot add them.

Q. But your list of individuals is the amount for that individual whether they're in the Iowa class or the FLSA class?

A. Correct.

Q. Is that true for your first calculation, the six million—$6.6 million calculation?

A. Correct.

Q. This type of calculation that we're looking at where you just take out a single component or subpart, can that be done for any other subpart of the overall calculation?

A. I believe so. It could be. It depends on what you are asking how the code would work; but yes.

Q. What if someone wanted to calculate the backpay just for the pre-shift and not the lunch period? Could you take the minutes from Dr. Mericle or from any other source and simply use [1285] those minutes and run your formula in the same way?

A. Yeah, that would just be changing the number of minutes overall so yes.

Q. Would that be the type of thing where you said it would take about 10 minutes?

A. Yes.

Q. And that again would give us a person-by-person amount?

A. Yes.

* * * *

[1301] MR. MUELLER: I want to pull up Defendant's 2272 which is her Deposition Exhibit 54.

Q. So this is your original list that I resorted before you took out people under $50, correct?

A. That was—that was after—this is after my report, but before I removed $50?

Q. That's correct.

A. Okay.

Q. Your original list of individual damages just sorted from lowest to highest. Do you remember we talked about this in your deposition?

A. Yes.

Q. Okay. You agree it was correct?

A. Yes.

Q. Let's go down your original list before Mr. Wiggins [1302] told you to cut out the people under $50 and I think we can clarify that my question about how many people would have gotten zero even before Mr. Wiggins told you to cut them out, let's go down to the first person who gets anything. I think I had my number slightly wrong. I said around 295. I think—let's see if it is around 211 people. Right there. Let's stop. Do you see at line 213 we see Akur Guang?

A. Yes.

Q. That means the first row is—numbered row is the header, correct?

A. That's correct.

Q. That means the first 212 people on your list—

A. Yes.

Q. —they would have gotten zero even assuming all of Dr. Mericle's numbers and everything else the Plaintiffs say, right? Correct?

A. That's correct. It would not have been enough to kick them into overtime.

Q. What you saw when you ran your numbers was that Mr. Guang, even if everything the Plaintiffs say is true, would have won 27 cents in this case, right?

A. That's correct.

Q. Okay. And you saw that Randy Guevara, even if everything Dr. Mericle said and everything else the Plaintiffs said is true, would have gotten $1.35, right?

[1303] A. That—that's correct, yes.

Q. The same with Michael Grimes, right?

A. That's correct. Now, this—let me say, you know, this is dependent, of course, on them being moved into overtime when I add this additional uncompensated time and remember that I am subtracting off what they have already been paid in K-code time.

Q. I understand.

A. As I discussed in my deposition, that I don't know the specific jobs that they were paid K-code time for, but it appeared from the data that they were being paid K-code time for departments or jobs that were not relevant so I am subtracting off everything they have been paid for the week potentially for jobs that are not at issue here.

Q. I understand. What you are saying is that we owe even if everything the Plaintiffs say is true, this would suggest according to your calculations we shorted a guy named Mr. Guang by about a quarter, 27 cents, right?

A. At least, yes.

Q. This would suggest that we fully paid Michael Grimes, but if you accept everything Dr. Mericle says, we shorted him a buck 35, right?

A. Yes.

Q. Okay. And these are your numbers, right?

A. Yes.

[1304] MR. MUELLER: Your Honor, we move in Defendant's 2272, just this chart.

MR. WIGGINS: No objection.

THE COURT: Received.

BY MR. MUELLER:

Q. Does that perhaps explain to you now why Mr. Wiggins cut out all the people under $50?

A. I don't know his reasoning. It could be. I don't know.

Q. It didn't strike you as a reason?

A. He has to make the decision, not me.

Q. Okay. Now, you can take that down. I want to talk about the data you considered in making these calculations because Mr. Wiggins asked you about it. You looked at our payroll information, right?

A. That is correct.

Q. You did look at our punch in and punch out information, right?

A. Yes, I did look at it.

Q. You considered Dr. Mericle's estimates of the average time employees in kill and fab spent on donning, doffing, washing, and walking, right?

A. That is correct.

Q. And by the way, do you know yourself whether anybody performed any off-the-clock work for which they were not already [1305] paid?

A. No, I do not.

Q. Okay. So for purposes of what you are doing, you are just assuming people worked overtime off the clock without being paid?

A. I was asked to make that assumption, yes.

Q. So you don't know the actual amount of donning and doffing for anybody in your charts, correct?

A. No, I do not.

Q. You were just asked to assume Dr. Mericle's averages?

A. That is correct.

Q. And I heard you say to Mr. Wiggins when he was just asking you questions that our pay data includes, you said, each specific task during the day. You didn't mean our data shows you actual donning and doffing time, did you?

A. No, it shows—it shows different job codes so if they started at one job code and went to a different job code, it would show that.

Q. Okay. Now, one of the things Mr. Wiggins sent you before you ran these numbers was Dr. Mericle's report, correct?

A. That is correct.

Q. And you looked at that, right?

A. Yes.

Q. And you understand that he was using a sampling approach to develop his numbers, correct?

[1306] A. Yes.

Q. And you then plugged those numbers into your formula, right?

A. That is correct.

* * * *

[1307] Q. Did you do anything to evaluate the validity or the reliability of Dr. Mericle's work?

A. No.

Q. You were just asked to use his numbers?

A. That is correct.

Q. Who told you to do that?

A. Mr. Wiggins.

Q. Do you have any independent information as to whether Dr. Mericle's times are accurate?

A. No.

Q. Have you reviewed any of Dr. Mericle's videotapes?

A. No.

Q. If the jury rejects Dr. Mericle's numbers, then your big calculation, the $6.6 million number is invalid, correct?

A. That is correct.

Q. Okay. Now, I want to talk about the K-code because you said you gave us credit for that, right?

A. Yes.

Q. How many total records did you receive from Tyson?

[1308] A. I don't recall. I would have to go through the code and look.

Q. I think you can look at your report. Do you have it up there? Do you have it in front of you?

A. I can get it. All right.

Q. If you could go to the bottom of page four and the top of page five.

A. Okay.

Q. According to your own report, you received over three million pay records, right?

A. That's correct.

Q. And of that, over 2.2 million pay records related to what you called a single work-related event for the day, right?

A. That's correct.

Q. What does that mean?

A. Well, like I said, they can go from one job code to another and so when I was looking at this particular paragraph, I was looking at how many people would have just punched in, worked one job code, and punched back out again.

Q. Okay. So at least several million pay records that we maintained you looked at, right?

A. Yes.

Q. Okay. So you agree we at least maintain those records, right?

A. Yes.

[1309] Q. All right. Now, do you agree that the data Tyson gave you was sufficient to make the calculations you wanted to make?

A. Yes.

Q. And you knew from some prior work involving that Lexington, Nebraska, plant, you knew how to read our payroll data, right?

A. Yes.

Q. And so you knew that the K-code was payment Tyson was already giving for donning and doffing time, right?

A. Correct.

Q. And you were able to determine from the data that Tyson had a policy of paying for donning and doffing activities, right?

A. That is correct.

Q. Okay. In fact, you said at the bottom of your report, I would like to read this, see if it is still your opinion, take a look at the bottom of page six of your report.

A. Okay.

Q. You wrote, "While Tyson Foods has been paying K-code time to certain production employees since 1998, the group of production employees who were awarded K-code time and the amount of K-code time awarded has varied." Is that what you wrote?

A. Yes.

Q. And you still stand by that opinion, right?

A. Yes.

* * * *

[1321] Q. Okay. Now, before February of 2007 you calculated back wages wages by department, correct?

A. That is correct.

Q. And that's because whole departments were getting paid the K-code, right?

A. Correct, everybody that worked within the department received those four minutes.

Q. Basically it was the production departments that got the K-code, right?

A. That's correct.

* * * *

[1331] Q. Did you ask Mr. Wiggins to give you information from any of those people about how much they thought they each worked putting on donning and doffing clothing?

A. No.

Q. Okay. So instead what you just did is you assumed one [1332] lump sum number for fab and one lump sum number for kill, correct?

A. That's correct.

Q. And that's an assumed amount of time, right?

A. That's correct.

Q. And by the way, you looked at Dr. Mericle's report, correct?

A. Yes.

Q. And do you remember in your deposition you told me you never have looked at his table with all the different time measurements just for the 744 people he did look at?

A. That is correct.

Q. Okay. And so the reason you plugged in these flat numbers is because Mr. Wiggins told you to do that, correct?

A. That's correct.

Q. Okay. And one reason I think you told me you plugged in these averages is because Tyson's payroll system doesn't track the amount of time each employee spends donning and doffing, correct?

A. That's correct.

Q. I mean, it is just not in the punch or pay data, correct?

A. That's correct.

Q. But another reason you did this is so you didn't have to input a separate number for each employee, correct?

[1333] A. Well, I mean, it certainly could be done. It would be very time consuming, but it could be done; but I wasn't asked to do that.

Q. Right. But isn't that why you told me you used an average, to avoid having to input a separate number for each employee?

A. I don't know that I said that. I believe I said I couldn't use the punch data. I don't know that I said I couldn't use a number for each person, but that would be very time consuming.

Q. Okay. So you didn't do that, correct?

A. No, I did not do that.

Q. Okay. Now, if an employee worked less than Dr. Mericle's average numbers up here, (Indicating) it is possible that Tyson's K-code payments already could have fully paid them for that time, right?

A. Potentially.

* * * *

[1350] Q. Thank you. Now, you also are not offering to the jury any calculation for non-knife users, correct?

A. No, I am not.

Q. Okay. So if the jury thinks that the people who wear the knife-related equipment were fully paid, you don't have any number that would be the damage for people who just wear the standard items like a hard hat, do you?

A. No.

Q. Now, Mr. Wiggins said there's a lot of programs on your computer and I want to ask you some questions about it. The way you did this originally, you had basically one all-in total for fabrication and one for kill and then you just told us who would get that money, right?

A. That is correct.

Q. That is, it was entirely based on Dr. Mericle's original numbers for fabrication and kill, right?

A. That's correct.

Q. And do you remember telling me you can't just take a fraction or a portion of that because as you go down in numbers, people—I think you told Mr. Wiggins this this morning—you start finding that people start dropping out of overtime, right?

[1351] A. That's correct.

Q. So if somebody was at 41 hours, let's say 40 and a half hours, and you took out an hour because let's say the jury concludes that work didn't take as long as Dr. Mericle said, a lot of those people would fall into non-overtime, correct?

A. That's correct. I don't know how many, but yes, some would.

Q. So you can't just take your original $6.6 million number and say well, we are going to cut it in half if we find Mericle's numbers are overstated by twice or let me put this a better way.

If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?

A. No, you cannot.

Q. Right. And the lower and lower the number of minutes goes, the more and more people start falling out of overtime, right?

A. That's correct.

Q. So at some point if you drop the number low enough, you would expect that people would be at zero on your chart, right?

A. Some people would, yes.

Q. Okay. Well, anybody whose K-code time covers the amount of time the jury thinks should be paid would be a zero, [1352] right?

A. That's correct.

Q. Okay. So, for example, if the jury concludes the activities take five minutes, you have no idea what kind of back wage calculations would result, right?

A. Not at this time, no.

Q. You have not done a five-minute calculation, have you?

A. No, I have not.

Q. And the way your model was originally set up, it was all or nothing, right?

A. Yes, you just plug in those area numbers, yes.

Q. Yeah, meaning if the jury—originally the way you did this if the jury rejected Dr. Mericle's numbers, there was no back-up calculation, right?

MR. WIGGINS: Objection, Your Honor. That is not—we object to that on the basis that we argued yesterday.

THE COURT: Overruled. Answer the question.

THE WITNESS: The code that I originally provided you was I believe set up as a macro so the numbers could be changed in that one line of code if that is what you are asking.

BY MR. MUELLER:

Q. That is not what I am asking. You didn't run any alternative to that all-in $6.6 million number originally, correct?

A. No, I did not.

[1353] Q. Do you remember telling me in your deposition it was basically all or nothing?

A. I mean, if that's what the number is.

Q. No, but do you remember telling me that?

A. If what you are getting at is can you come up with a number based on different estimates, then no, it has to be what is on that chart. It would have to be recomputed.

* * * *

[1365] Q. Let's look at this chart first, Dr. Fox. Has Tyson and its expert, Dr. Nickerson, had all of your data and your algorithms, formulas, since at least July of this year to run anything it wants to run?

A. Yes.

Q. Could it have run every one of these things itself in July of this year?

A. Yes.

Q. Let's go to the prior chart, I have never seen these charts so I am going to have to borrow yours, look at where it says late July 2011, Dr. Fox revises

her class list and back wage calculations and that occurred after your July 1st report?

A. Correct.

Q. Why did you change in late July?

A. Right before I did my report on July 1st I received a chart showing gang time jobs. My original report computed damages for anything in the fabrication and kill departments, I received this chart saying that only these specific jobs were at issue in this case so I had to revise my computations based on those specific jobs.

Q. You received—I'm sorry. Go ahead.

A. I then got a chart from Dr. Nickerson with his class list saying these are the people that should be at issue in the [1366] case. I compared that with what I had already done and with the gang time jobs and came up with what I determined to be the class list people who had worked a gang time job at least one day or one shift within their specific liability period.

Q. So of that new data that you got from Dr. Nickerson, partly did the remainder of it come from Tyson?

A. Yes.

* * * *

[1367] Q. So is there anything at all that their expert, Dr. Nickerson, could not do as of July 1st that you have done since July 1st?

A. No.

Q. All right. Now, to this day has Dr. Nickerson given you even one of his backpay calculations? Just one?

A. No.

* * * *

[1368] Q. Has he ever sent you anything else that he asked you to incorporate or change?

A. Other than the report which I read shortly prior to my deposition, he talked about—again he talked about the people, but that was resolved with the class—the revised class list and he talked about the gang time jobs I believe. I would have to look through his report again; but he—in his report he did not take issue with my methodology.

Q. And the things that he gave you about the class list [1369] that you have told us about, did you accept what he gave you and incorporate it in your calculations?

A. Yes.

* * * *

Q. Now, Mr. Mueller asked you several times about yesterday's use of an outlier method by Dr. Mericle to reduce his times and he seems to want you to do that. In fact, that was on the list.

MR. MUELLER: Objection to commentary.

THE COURT: Just pose a question, please.

BY MR. WIGGINS:

Q. I want you to take what you testified to we wrote on the board, one is 24 second change. Can you see that?

A. No.

Q. Can you see it now?

A. Yes.

Q. I want you to take this 24 second change where he went from 21.25 originally his number, he reduced it to 20.83 and the [1370] 76 second change in which he went from 18 minutes to 16.73 minutes. Take those two, plug them in your formula, and tell us what the backpay is.

A. It will take about 10 minutes.

Q. All right. Have you now changed the variables and it is running?

A. Yes.

* * * *

[1373] Q. It is done? All right. Let's write it down. What is the backpay on Dr. Mericle's reduction yesterday?

A. For the FLSA class—do you want Iowa first? I can give you Iowa first.

Q. Let's do Iowa since I stacked it that way.

A. The Iowa class would be 6,198,191.67.

Q. All right. What does the FLSA number come to?

A. It is 1,490,652.35.

* * * *

[1375] Q. Now, looking at the low end of that range that Mr. Mueller asked you questions about, I think he showed someone got 15 cents, one person got a dollar 35 before you put in the $50 rule. If someone got as little as 15 cents or 27 cents, I can't remember, what does that indicate about how long they worked at the company?

A. Well, I would have to go back and look, but they—they wouldn't have worked very long. I mean, I

could certainly look up someone's records, but to get only 27 cents, you know, at an overtime rate of pay would, you know, probably they would have gotten damages for a day or something. Maybe they only worked a week.

Q. I want to be clear on the—on the 3,344 people that you identified based on the Court's definition of the class in this case. Tell us again how many days someone had to work for the company to just get into the class of 3,344.

A. They had to have worked a gang time job for at least one shift within that specific period of time.

Q. All right. So we start off with a group under the Court's definition that's got some one-day people or two-day people or three-day people in it, correct?

A. Possibly, yes.

Q. And does that affect these low numbers?

A. It would.

Q. And how would it affect it to state the obvious?

[1376] A. Although if it was only one or two days, they wouldn't have gotten any damages at all because it wouldn't have gone into overtime because they had to work at least the week, to get damages they had to work some overtime so they would have had to work at least a week.

* * * *

[1384] Q. Okay. But did you ever look at—to see if, in fact, in most weeks they work 48 hours?

A. I did not—I did not look at that specifically, but based on the fact that only 200—what did we say—212 I think wouldn't get anything, I mean, that would mean

that most of them are working overtime or would be popped over into overtime.

* * * *

[1430] LONNY JEPSEN,

witness herein, called as a witness by the Defendant, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PASCHAL:

Q. Good afternoon, Mr. Jepsen. Mr. Jepsen, could you tell us where you currently work?

A. Dakota Dunes at the Tyson Fresh Meats headquarters.

THE COURT: Would you pull closer to the microphone or pull them closer to you?

[1431] THE WITNESS: I work at Dakota Dunes at the Tyson Fresh Meats headquarters.

BY MS. PASCHAL:

Q. Where do you live?

A. About 20 miles south of Storm Lake, Iowa.

Q. Mr. Jepsen, what is your position for Tyson Fresh Meats?

A. I'm a director of human resource operations.

Q. How long have you held that position?

A. I've been serving in this role since 1996. We changed it to this title in about 2003.

Q. And could you please describe for us the duties of director of human resources?

A. My job is to oversee the HR functions in several of Tyson Fresh Meats facilities.

Q. Does that include the Storm Lake facility?

A. Yes, it does.

Q. How long have you had oversight of the Tyson Storm Lake facility?

A. Since I accepted this position in 1996.

* * * *

[1455] Q. I would like to call up Plaintiffs' 166 which is already in evidence. Mr. Jepsen, are you familiar with what is discussed in this document?

A. Generally, yes.

[1456] Q. And if we go to number two, if we could just highlight that, what does it mean that the amount of time will be calculated by minutes attached to each job code?

A. Like I explained earlier, there's a specific number of K-code minutes that are assigned to each one of the jobs on the production floor.

Q. Does this just say that it is going to be tied to—the K-code will be tied to the job code that you are assigned to for the day?

A. I believe that's what it means, yes.

Q. I would like to go down to item number seven, please. It says, "Working two shifts, A and B, will have time calculated for each shift individually." Then it says, "Currently K-code is paid only once per day." What does item number seven mean?

A. Occasionally we have people we call it working doubles, it might be an A shift team member who is going to stay and work some time on the B shift, it might be a B shift team member who comes in a little early to help out on the A shift. Prior to this change we only paid K-code one time per day. Okay. And so if you were working a double, for instance, you got it once and it looks like when we made this—what this indicates is when we made this change, now you'd receive it for both shifts.

Q. And since 2007 is that how the K-code has been applied, once per shift as opposed to once per day?

[1457] A. Yes, that's correct.

Q. Let's look at item number eight, please. Could you read number eight aloud for us?

A. "Minutes to pay will be determined by the job code on the first detail of each day or shift, excluding the setup code of 90C1."

Q. What does this mean?

A. There are a certain number of people that come in before the shift starts to help set up to make sure the sterilizers are—have hot water in them, to make sure that there's boxes for the day, just to make sure that things are prepared to—for production for the day, just help the supervisors. Those people start depending upon where you're at maybe a half hour, maybe an hour before the shift actually starts.

When they're doing their pre-shift activities, getting the floor started, the setup I should say, when they're doing the setup activities, they typically don't wear their safety equipment out to set up the floor so they'd go help the supervisors get the floor set up and when

the floor is ready to go, then they put their safety equipment on.

Q. Are they putting their safety equipment on on paid time?

A. Yes, because the setup people would be on the clock at that point.

* * * *

[1459] Q. If the company decided to change a K-code for a job at the Storm Lake plant, would you be involved?

A. Yes, I would.

Q. How?

A. Initially my involvement will be really just to determine if K-code is appropriate. I don't get involved in the number of minutes, it is just whether K-code is appropriate for that job. If it is appropriate, then the industrial engineer will do their study to determine how many minutes and then there's kind of a sign-off form where there's several signatures and I'd be one of the signatures and then once all the signatures are on there, then it goes to the HRIS group and they input it in the system.

Q. Is this process followed at the Storm Lake plant?

A. Yes.

Q. Are you familiar with a man named Jim Lehmkuhl?

[1460] A. Yes.

Q. Who is Mr. Lehmkuhl?

A. Jim is the team leader of the pork industrial engineers so he oversees the industrial engineers in the pork facilities.

* * * *

[1461] Q. Now, we have heard some testimony that some employees no longer received the K-code when it was changed in 2007. Is that an accurate statement?

[1462] A. Yes, it is.

Q. Do you know approximately how many employees?

A. Of the people that were already receiving K-code, about 70 percent continued to get four minutes and a lot of them ended up getting more.

Q. So it was the remainder of the 30 percent that no longer received the K-code?

A. That's correct.

* * * *

[1463] Q. Mr. Jepsen, why was the four minutes eliminated for employees who do not wear the special knife-related equipment?

MR. WIGGINS: Objection, Your Honor. No personal knowledge. He's—he was not the decision maker.

THE COURT: Overruled. Answer the question.

THE WITNESS: To answer that question, we've probably got to go back to when we implemented in the first place. Several years prior to 2007 we—we paid everyone that was associated with a department that got K-code four minutes and the reason that we did that was because we were working an eight-hour day.

When we initiated the four-minute K-code for everybody, we shortened the day to seven hours and 56 minutes and then people got four minutes of K-code so that was the eight hours of—or eight hours of pay.

When we made that decision to shorten the workday, we made a decision to allow people that didn't meet the criteria to [1464] continue to get the four minutes because if we didn't do that, they would in essence be taking a four minute per day pay cut and in Storm Lake where we work a lot of Saturdays, I mean, that could be 20 to 24 minutes so when we initiated the four minutes, we made a conscientious decision to allow the people that didn't meet the criteria to continue to get it so they wouldn't get a smaller paycheck.

* * * *

[1485] Q. Why is the clothes changing or K-code item for this paycheck all paid at the overtime rate?

A. Because he's already received 40 hours of straight time pay at the top. Anything after 40 is time—time and a half.

Q. We heard testimony earlier that the K-code is for pay purposes placed on the check on Saturday. Is that an accurate statement?

A. Yes.

Q. Since he had already worked 40 hours of production work by Saturday, is that why his K-code for the entire week was being paid at the overtime rate?

[1486] A. Yes.

* * * *

[1495] Q. In concept is assigning a time by which you're supposed to clock in and clock out and do all of your donning and doffing any different than paying K-code time?

A. That's what the K-code is. It is the amount of time that we expect you to do that pre and post-shift activity.

* * * *

[1498] Q. And you generally run about six days a week, don't you?

A. Generally, yes.

* * * *

[1517] Q. So you're paying four minutes flat rate based on an average, correct?

A. Prior to 2007 you were paid four minutes.

* * * *

[1522] Q. You can refer to your list that you used in your testimony yesterday if you need to; but you would agree that the rubber apron or plastic apron is not part of the four minutes, correct?

A. That's correct.

Q. And you would agree that the boots, we've got them sitting there on the table, they're not paid as part of the four minutes, are they?

A. That's correct.

Q. And the rubber gloves, they're not paid for as part of the four minutes, are they?

A. That's correct.

Q. And the cotton gloves, they're not paid for as part of the four minutes, are they?

A. That's correct.

Q. The white pants that you told us the company requires employees in kill to wear, you don't pay for them as part of the four minutes, do you?

A. I believe earlier it said light colored pants, not specifically white. Most people do wear white pants.

Q. The company—most people wear the company-issued white pants, correct?

A. Because we pay for it, yes; but if they choose to [1523] bring in a different pair, they can.

Q. If you bring in a different pair you will launder those for them overnight and put them in the laundry bag for them?

A. Usually, yes.

Q. The company requires the light colored or white pants to be worn every day in the kill department, correct?

A. Yes.

Q. That is not paid for as part of the K-code time, is it?

A. Prior to—based on this example, that's correct.

Q. This is not an example, these are—this is a list of things you pay for right there on the Stipulation, correct?

A. Based on this time frame, that's correct.

Q. I want to go over the four minute time frame. We will come to the next one in a minute. White pants—I mean white shirt, the company does not include that within the payment of the four-minute K-code, do they?

A. That's correct.

Q. The company does not include the frocks, it does not pay for the frock as part of the four minutes, does it?

A. That's correct.

Q. The company does not pay for the hair net as part of the four minutes, does it?

A. That's correct.

[1524] Q. It doesn't pay for the beard net or the hoodie, it has been called both, but it doesn't pay for that, does it, as part of the four minutes?

A. No, it does not.

Q. The company does not pay for the earplugs or earmuffs that it requires all employees to wear as part of the four minutes, does it?

A. We provide them. I mean, when you say we don't pay for them, everything you put up there we provide.

Q. Yes.

A. So yes, we actually do pay for the item; but as far as the time putting it on, that's no.

Q. That is not part of the four-minute pay that you are describing here in this Stipulation?

A. That's right.

* * * *

[1527] Q. Okay. Now, I want to ask you about another Stipulation you were shown. You were shown Stipulation 34 yesterday afternoon by Defendant's counsel. This says that on February 4th the company added its calculation of the walking time and you said you were familiar with that, correct?

A. Yes.

Q. And obviously the reason you added it is because you didn't pay it before then, correct?

A. Correct.

Q. And the walking time is that time that the company studied in 2006 or 7 on a walking time study that we have seen with prior witnesses, you are aware of that, aren't you?

A. Yes.

* * * *

[1528] Q. Okay. You can take it down. So we know that prior to February 4, 2007, that three minutes of walking and carrying time to the line and from the line back to the locker room every day was not paid for, was it?

[1529] A. I believe that would be correct.

* * * *

Q. My question was you would agree that food safety is paramount to Tyson's business?

A. Yes.

Q. And Tyson is in the business of producing a safe, wholesome, uncontaminated meat product, correct?

A. Yes.

Q. And that's for sale to its customers, correct?

A. Yes.

Q. And that's the source of Tyson's profits and ability to stay in business is selling uncontaminated meat to the public or to its customers, correct?

[1530] A. Yes.

Q. And that's the primary duty of every employee in the production room is to produce a safe, wholesome, uncontaminated meat product, correct?

A. That's the ultimate goal, yes.

* * * *

[1537] Q. That is when you do these donning and doffing, but you are paid regular time, not overtime, correct?

A. If you don't work more than 40 hours, then it is paid at regular time.

* * * *

[1560] JIM LEMKUHL,

witness herein, called as a witness by the Defendant, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PASCHAL:

Q. Yes. Good morning, Mr. Lehmkuhl.

A. Good morning.

Q. Where do you live?

A. I live in Wakefield, Nebraska.

Q. Where are you employed?

A. I'm employed at Dakota Dunes, South Dakota.

Q. By whom?

A. Tyson Foods.

Q. Do you work at the corporate headquarters for Tyson Fresh Meats in Dakota Dunes?

[1561] A. I do.

Q. What is your position at Tyson Fresh Meats?

A. I'm group manager of industrial engineering for the Pork Division.

Q. How long have you worked for the company overall?

A. 15 years.

* * * *

[1562] Q. As pork group industrial engineering manager, what are you responsible for?

A. I'm responsible for the general oversight of—I have eight industrial engineers that report to me, seven at six of our pork plants, we have two actually in our Waterloo facility.

Q. Is the Storm Lake plant one of the plants that you oversee as the pork group industrial engineering manager?

A. Yes, it is.

Q. Does the Storm Lake industrial engineer report to you?

[1563] A. He does.

* * * *

[1564] Q. In general terms could you explain for us how the K-code changed in nature from being four minutes to being a range of minutes?

A. Two things happened. What we did was we added two walk components, a pre-shift walk component and a post-shift walk component, and we changed from paying flat to paying job specific, meaning each job actually got compensated for the specific equipment you were required to wear.

Q. You said there were two reasons, you made it job specific and was there a walking time addition as well?

A. Yes, we included a pre-shift walk time and a post-shift walk time.

MS. PASCHAL: I would like to call up the plant demonstrative, the first floor, please.

Q. Could you tell us specifically what walking time routes were added in 2007?

A. The routes that were added are highlighted in red and blue. The red was the kill wash station to the locker room, center of the locker room, and the blue was the kill—center of the kill floor to the locker room.

Q. So did the route that was measured from the locker room onto the floor differ from the route that was measured from the floor back to the locker room?

A. Yes.

Q. What was the difference?

[1565] A. Well, the post-shift included—the post-shift was from the center of the wash station to the center of the locker room and the pre-shift was from the center of the locker room to the center of the production floor.

Q. What accounts for that difference in the measuring points?

A. There was a walk component previously included in the four-minute study and that was from the—from the work station to the center of the wash station post-shift.

Q. So that was part of the four-minute K-code prior to the 2007 changes?

A. Yes.

Q. If we could just see the upstairs component of this map, please. Do you see that the blue and red lines continue on?

A. I do.

Q. Does the red line represent what was measured for post-shift walking in 2007 or for the 2007 changes?

A. Yes.

Q. And does the blue line represent what was measured that ultimately became part of the 2007 K-codes for pre-shift walk time?

A. Yes.

Q. Now, this example that we have just walked through is for the kill floor. Was a similar measurement done for the [1566] processing floor?

A. Yes, there was.

Q. Even though it is not represented on this particular diagram?

A. Correct.

Q. How was the walking time for these routes that we have just looked at measured?

A. What we did was determined the most common traveled path that all of the team members take and then what we used was a measuring wheel or like a rolling tape measure that measured a linear distance.

Q. Was this measuring wheel also referred to as a contractor's wheel?

A. Yes.

Q. Once you measured the linear distance, what did you do?

A. We took that standard and applied it toward an industry-accepted standard of 34 inches per step, I think it is approximately .648 seconds per step and just did the math.

Q. When you say an industry-accepted standard, is that an industrial engineering standard?

A. It is something you could just find in a general industrial engineering book, yes.

Q. Were these measurements of walking time pre and post-shift actually made at the Storm Lake facility?

[1567] A. They were.

Q. Who was involved in that process?

A. It would have been the industrial engineer there at the time.

Q. Were you managing that process at that time?

A. Yes.

Q. Was the Storm Lake industrial engineer reporting to you at that time?

A. Yes.

Q. What year were these measurements done that we have been looking at?

A. 2006.

Q. Did industrial engineering compile this walking time information anywhere or put it in any sort of document?

A. Yes, we did.

* * * *

[1577] Q. So looking along at these pieces of equipment that are under Pre-Shift Audited Activities, are these the items that are included in the K-code?

A. Yes.

Q. Do you see underneath each item there is a time associated with it?

A. I do.

Q. What does that represent?

A. That's the average time that we allow or they get to either don or doff that particular piece of equipment. In this case it would be to put on because it is pre-shift.

Q. And these average times that were calculated, is that something that the company's industrial engineering department did in 1998?

A. It is.

Q. And were these measurements that we're looking at under Pre-Shift Audited Activities and each particular item, were those measurements used to develop the four-minute K-code?

A. Yes, they were.

* * * *

[1588] Q. We talked about these measurements being performed in 1998. Do you have an understanding as to who within the company asked industrial engineering to make these measurements in 1998?

A. Yes, we were asked by the corporate legal department.

Q. What types of activities did the legal department ask industrial engineering to measure?

A. We were provided a list that was just on this spreadsheet that was provided to us and we were asked to study those items.

Q. What types of items are they, generally speaking?

A. I would consider those items unique to the meat industry.

[1589] Q. Would you—if I use the term specialized knife-related equipment, would you agree with that term?

A. Yeah, mesh gloves, cat cut gloves, arm guards, items like that.

Q. Were you asked to study items like the frock and the hard hat and earplugs?

A. No, we were not.

Q. Do you consider those unique items?

A. I do not.

Q. What do you consider those?

A. I mean, those are items that you can see in other industries so they would be, you know, more of a common or non-unique item.

Q. What were the original instructions given to industrial engineering regarding how to measure the activities that we just looked at?

A. The original instructions were to try to pick out one team member and follow them either pre-shift or post-shift throughout the whole process; but we really found that difficult to do just because, you know, everybody does it a little bit different in the mornings and post-shift, we had some steam issues, so we really had to go back to the drawing board as far as the first method.

Q. How did you adjust the process?

A. We went to just picking out specific pieces of [1590] equipment like an arm guard, we would position ourselves advantageously in the facility to where we could get as many observations and times as possible and so when they, for example, were coming off the floor to the wash station, they would be taking off their equipment and so then what we would do is just focus on that one piece of equipment and gather as many times as possible.

Q. So if it were, for example, a mesh glove, would you measure the mesh gloves over and over again?

A. Yes.

Q. Okay. Is the process that industrial engineering followed in 1998 to develop the K-code described in a document?

A. Described in a document?

Q. Yes.

A. Yes, it is.

Q. I would like to show Plaintiffs' Exhibit 15. Is this a document that you were referring to?

A. Yes, it is.

MS. PASCHAL: Your Honor, we move for admission of Plaintiffs' 15.

MR. WIGGINS: No objection.

THE COURT: Received.

BY MS. PASCHAL:

Q. Mr. Lehmkuhl, I would like for you to help us understand this document and walk us through it. If we could go [1591] to the top, and if we could—

MR. WIGGINS: I really should have said—

THE COURT: Turn your microphone on, please.

MR. WIGGINS: Same objection, but you have already overruled it so this is—this is 1998 at which he was not at the plant.

THE COURT: Overruled. It is received.

BY MS. PASCHAL:

Q. Mr. Lehmkuhl, could you read Section I(a) and then underneath it the first item?

A. "Spring 1998. Approached legal department with request to consider revamping current auditing protocol. Concerns were: Difficulty of measurement protocol, following individuals through the plant and into locker rooms was infeasible, made more difficult by beginning and end of shift confusion, many people making their way out at end of shift, many people socializing prior to and after shift. In addition, steam makes it difficult to see in the plant, and wash stations face the wall making timings difficult."

Q. Is this an explanation of what you just told us about the original protocol and why it could not be followed?

A. That's correct.

Q. Now, if we go to Section I(b), please. If you could start with Subsection 1, and then continuing on A and B.

A. "Divide activities into two categories. Items that [1592] are variable in time, and those that are not.

"Non-varying. Certain activities such as putting on and taking off safety gear should not vary, thus continued measurement is redundant absent a change in equipment."

Then B, "Varying. Certain activities like walking, waiting, and washing time, though currently measurable, should be actively monitored to ensure their time is minimized."

Q. I believe you just gave us an example of how you timed items such as the mesh glove. Did you make those measurements on the production floor, in the locker room, in certain areas of the plant?

A. Yeah, I mean, we didn't take timings in the locker room, but in pre-shift we would position ourselves at the entrance to the kill or cut floor because that's where a lot of team members would be putting on their equipment and post-shift we would locate ourselves close to the wash sinks because as team members approached, they would be removing the stuff.

Q. Why didn't you measure in the locker room?

A. We didn't need to get—to get the times that we needed and then, you know, also it is a personal space. There's restrooms in there.

Q. Were you able to get enough timings, for example, donning a mesh glove or donning a mesh apron by measuring on the production floor or outside the locker room?

A. Yes.

[1593] Q. You just read to us two sentences about varying and non-varying activities. Could you explain to us what the difference is?

A. Start with varying in activities and, you know, as described here, it can be walking, waiting, and the reason they vary is because one example is there's several wash stations in the facility and, you know, if we're having a plumbing issue, some wash stations are down, that would change their time that they wait or to wash their equipment so those times are going to vary.

Q. How does that contrast with non-varying activities?

A. Non-varying is exactly what it says, you know, putting on a mesh glove today should be the same amount it takes to put it on 10 years ago. It is not just going to vary.

Q. Now, if we look at the next sentence under B2, could you read for us this sentence?

A. "Conduct a comprehensive baseline audit in nonunion plants of audited activities to come up with an overall average time for compensable activities."

Q. Is what you just described for me in terms of industrial engineering going out into the plant on the production floors, measuring donning and doffing activities, part of what is just described in number two?

A. Yes.

Q. Did you also measure washing time?

[1594] A. Yes.

Q. Did you also measure the wait to dip time?

A. Yes.

Q. Did you also measure the dipping time?

A. Yes.

Q. Did you also measure the walk time from the work station to the wash station post-shift?

A. That was included, yes.

Q. This says compensable activities. Does that refer to the types of activities that we just discussed?

A. Yes.

* * * *

[1599] Q. And could you just explain to us or paint a picture for us of how these timings were actually done inside the plant?

A. For example, like I said earlier, the industrial engineer would locate themselves in the facility where they would be able to get the most observations so a good example would be post-shift locating themselves by the wash station where several would be coming off the floor, removing their equipment, preparing to wash it.

* * * *

[1600] Q. You referred to the industrial engineers using a stopwatch to perform the measurements. Can you just give us a very simple explanation of how they would do that, say a person walks by and is donning an item?

A. As a person walks by and they're donning an item, it was really just a very simple time study. When the IE determined that they started the process, they'd start their [1601] watch and when the industrial engineer determined they were done with the process, they would stop the watch.

Q. Would they record that time?

A. And then record that time.

Q. What if one of the people you were timing seemed to be performing a task particularly slowly? Would you disregard that time?

A. No, I mean, not unless it was—there was like an obvious stop and they were talking to somebody else, you know, then that time would be, you know, really not relative; but most generally we—we took everybody that came by.

Q. And so that would include both fast and slow people?

A. Exactly.

Q. Let's go now to Subsection E. Could you read for us that statement, please?

MS. PASCHAL: Actually I think we are on the next page.

BY MS. PASCHAL:

Q. Could you read that please?

A. "On the basis of the timings conducted, an average time to complete each task was calculated at each plant."

Q. If you could read F as well.

A. "At each plant, each knife-carrying position was listed with relevant tasks associated with such jobs listed. The average time per task calculated under E was included as the [1602] individual times associated with each task and the total time associated with all tasks performed by each knife-carrying position was calculated."

Q. So, for example, after an industrial engineer got a certain number of observations for donning a mesh glove, what was done with those observations?

A. Those—those times were averaged.

Q. Was the resulting average then the average for a Storm Lake don glove?

A. Yes.

Q. What was the next step?

A. The next step was to really apply those times for all of these activities that we're talking about to each individual job or specific work code to come up with a total time.

Q. So once you had an average for a plant for a particular item, did you then look at what other plant averages for that same item were?

A. Yes.

Q. And what did you do with those data?

A. We then averaged those all together across the nonunion plants and that's how we came up with the 3.8 minutes.

Q. So, for example, you have—for Storm Lake you have developed—as I understand it you developed a number that was average of don a mesh glove?

A. Yes.

[1603] Q. Was that number then averaged with every other plant's average don mesh glove time?

A. Correct.

Q. And then you mentioned those averages being applied by position?

A. Correct.

Q. And how was that done?

A. That was actually done with a weighted average. We, for example, if you had 10 people in the plant that performed that activity, you count it 10 times versus if you had one plant it would count once so we came up with a total weighted average for each plant and then as I said earlier, then we went and averaged those again across all the nonunion plants.

Q. Now that you have had your average across all your plants for a mesh glove, you then made an average for each position, is that accurate?

A. Yes.

Q. And then you explained there was a weighted average across each position to get a plantwide average?

A. Correct.

Q. After you developed a plantwide average, what was the next step?

A. The next step like I described earlier is we averaged all of those waited averages for each plant across the nonunion plants to come up with the total 3.8 minutes.

[1604] Q. What did you do with the 3.8 total?

A. We rounded it up to four.

Q. Did that become the four-minute K-code?

A. It did.

MS. PASCHAL: If we could turn to the page that is Bates labeled at the bottom TSE 00194650. That's it. Thank you. If we could call out that top box, please.

Q. What is this a summary of?

A. That's the summary of the weighted average of all of the beef and the pork plants, nonunion.

Q. Do you see where Storm Lake is listed?

A. I do.

MS. PASCHAL: Could we highlight that, please, Connie?

Q. Do you see that 3.357 number?

A. I do.

Q. What does that represent?

A. That represents the summation of their total time for the Storm Lake facility.

Q. So is that the plantwide average for Storm Lake?

A. Yes.

Q. How does that compare with the average of all plants?

A. It's less.

Q. Where is the average for all plants on this chart?

A. At the very bottom it says Weighted Average, 3.8.

Q. And then that was rounded up?

[1605] A. To four minutes, correct.

Q. So is the four-minute K-code that was implemented in 1998 higher than what the actual calculated average for the Storm Lake plant was?

A. Yes, it is.

* * * *

[1619] Q. All right. Now, these items listed on the board there, for the record they are rubber or plastic apron, boots, white shirt, white pants, frock, hair net, beard net, earplugs, and muffs, those were never studied even in 1998, were they?

A. Those were not on our list of items to study, correct.

Q. Because you looked at just the things the lawyers told you to look at, correct?

A. That's correct.

Q. And they didn't put these on the list to be studied, did they?

[1620] A. They did not.

Q. These items have never been audited or studied since 1998 either, have they?

A. They have not.

* * * *

[1621] Q. Okay. At that time in 2006 you once again studied only what the lawyers told you to study, correct?

[1622] A. Correct.

Q. So in 2006 once again, you did not study any of these items on the board that I have read out to you, have you, did you?

A. No.

Q. You didn't study any of the items in Stipulation No. 25 in 2006, did you?

A. Not in 2006, no.

* * * *

[1624] Q. When you—when employees are putting on the items on the board, the apron, boots, rubber gloves, cotton gloves, white pants, white shirt, frock, hair net, beard net, they do that in combination?

A. Yeah, I think everybody has their own method of donning.

Q. And they do those items in combination with the mesh apron, belly guard, steel, scabbard, mesh glove, Polar glove, Polar sleeve, Plexiglass arm guard, mesh sleeve, membrane skinner glove?

A. Yes.

Q. It is an ensemble?

A. I would agree.

Q. In order to understand how long it takes to do that ensemble or that motion of putting on and taking off, shouldn't you study the whole set of activities?

A. Those weren't our instructions. Our instructions were to study a certain list of equipment and that's what we completed.

Q. I recognize that on this study that's the way it was done, but my question is a little different. Shouldn't you—shouldn't a time study, if you are going to do it yourself, if [1625] you were given the freedom to do it yourself, to apply your own expertise, don't—

MS. PASCHAL: Objection. Foundation. Mr. Lehmkuhl is not being offered as an expert witness.

THE COURT: Overruled.

BY MR. WIGGINS:

Q. If you were given the freedom to exercise your expertise and your education, wouldn't you agree that

to time these activities you really need to look at them in combination?

A. I mean, I agree. If I wanted to time all of those things, then yes.

* * * *

[1631] Q. Let me just ask you the question first. These [1632] activities in 1998, they were videotaped, weren't they?

A. I believe some of them were, yes.

Q. And we've not been shown any of the videotapes from the 1998 study, have we?

A. No.

Q. That would tell us if you were staging the activities and where they were staged, correct?

A. Potentially, yes.

Q. And that would tell us which activities were done in a conference room, if any, and which were done in the place that it is normally done, correct?

A. It may. I mean, if that's what was videotaped.

Q. Now, you were shown Exhibit—where is the list with the counts on it? You were shown the spreadsheet that had various things on it. Do you remember that?

A. Yes, sir.

Q. Exhibit 320. Can you bring that up? While he is bringing that up, the activities that were looked at either in a conference room or in the hallway or wherever, you used a few employees, sometimes one, sometimes two or three, maybe four people at your Madison plant, correct?

A. As I testified earlier, we got as many times as we could.

Q. But they were small samples of one, two, or three or four people, weren't they?

[1633] A. Could have been, yes.

Q. And some of them were supervisors, correct?

A. Again, I don't remember exactly if that was the case.

Q. But you did testify in your deposition it was a combination of supervisors doing the role playing and employees, didn't you?

A. I said that was a possibility.

Q. The protocol did not prohibit that, did it?

A. No.

Q. All right. Now, look at the bottom of that page that you were shown, if we can look at the line called Count. Go down a little bit further. Is this the exhibit? It doesn't look the same. Here we go. There. You see that row at the bottom called Count?

A. I do.

Q. And that is telling us how many people were done for all 11 plants, correct, one of which is Storm Lake?

A. Yes.

Q. So in the category of two shin guards for 11 plants, you had eight people total for all 11 plants, correct?

A. Yes.

Q. The next category, mesh apron, you had only 16 people spread across 11 plants, correct?

A. Yes.

Q. The next column, legging apron, you had only eight [1634] people spread across 11 plants, correct?

A. Yes.

Q. That's less than one per plant with your sample size, wasn't it?

A. Yes.

Q. The next column, belly guard, you had only nine people studied spread across 11 plants which was less than one per plant, correct?

A. I mean, that just doesn't seem right to me. I need to back up because I specifically took more measurements than that in Madison so I can't testify for sure exactly what count means.

Q. You have no idea of the sample size at Storm Lake, do you?

A. I don't.

Q. Did you bring any records here today of the Storm Lake study?

A. As far as the raw data and the—

Q. Anything at all that would touch upon the Storm Lake study from 1998.

A. I don't have anything on my person, no.

Q. You would agree that everything you have been shown so far was at the corporate level for all 11 plants, correct?

A. A summary, yes.

Q. Now, we have had tapes shown a good bit in this trial from a Dr. Mericle. Are you familiar with the fact that he [1635] videotaped activities at the Storm Lake plant?

A. Yes.

Q. Have you looked or studied any of those tapes?

A. I have not.

Q. Have you performed any statistical tests?

A. No.

Q. As I understand how you did this, you would just take the first employee that would present themselves to you coming out of the locker room and you'd pick them? Just how did you pick the samples?

A. It was random. I mean, as I described earlier, we would locate ourselves in a location of the plant where we felt there was going to be a lot of traffic, as I have mentioned several times earlier like post-shift we would be by the wash stations because team members would be taking off their equipment and so we were able to get several times there.

Q. Okay. So what—you say it was random?

A. It was random.

Q. And what you mean by that is you'd have a group of people coming at you and you would pick one, correct?

A. Pick one, correct.

* * * *

[1637] Q. Does each plant have its own industrial engineer?

A. They do and Waterloo has two as I described earlier.

Q. Then corporate, it has some more industrial engineers at the corporate level?

A. Yes.

[1638] Q. How many?

A. One over the pork side and then one over the beef side and then there's a senior industrial engineer that reports to each of us at Dakota Dunes.

Q. A senior what?

A. Industrial engineer that reports to us at Dakota Dunes.

Q. Somewhere, 10 or 12 industrial engineers at the Tyson Fresh Meats Division?

A. Approximately, yes.

* * * *

[1677] TRANSCRIPT OF PROCEEDINGS, held before the Honorable John Jarvey, at the Federal Courthouse, Sioux City, Iowa, commencing at 8:17 a.m., September 23, 2011, reported by Linda Faurote-Egbers, Certified Shorthand Reporter and Notary Public for the State of Iowa.

* * * *

[1680]THE COURT: The record can reflect that we are outside the presence of the jury on what appears to be the final morning of trial. It is my understanding that the Defendant will rest shortly after we begin this morning. The Court receives over objection Exhibit D 2013. The primary issue in this case is authentication and the last witness who came here last evening, Mr. Lehmkuhl, certainly did that, although in part by

circumstantial evidence. I cite United States versus Estrada, 583 F3d, 669, a Ninth Circuit case from 2009. I thought there was also a very instructive case from the Fourth Circuit, the Miller case from the Fourth Circuit on that issue.

The parties indicated to me yesterday that perhaps they would be willing to make their record concerning the final jury instructions this morning, even though the proof is not technically closed yet. Obviously if something happens in the next hour, whenever we finish with evidence today, you retain the right to supplement your record in that regard; but we might as well get this done now.

We have had I think three sessions outside the presence of the jury, but none of them were on the record and so this is the opportunity you have to make your record concerning the jury instructions. Mr. Wiggins, let's start with you.

* * * *

[1689] THE COURT: Mr. Mueller?

MR. MUELLER: Defendant does not have any objections to the instructions or the Verdict Form. If you want comment on anything Mr. Wiggins just argued, I am happy to answer your questions.

* * * *

[1718] THE COURT: Please be seated. We are going to have the closing arguments of the lawyers. You will recall from my preliminary instructions that the closing arguments in the case are not evidence. The evidence is done. This is an important part of the trial, it is that opportunity that the lawyers have to attempt to persuade you that their clients' position is the [1719] one that you should adopt in your deliberations. I think I

told you yesterday that I have given each side as much as 90 minutes to make their closing argument. Mr. Wiggins, of course, will go first, then Mr. Sapp will go second so that Mr. Sapp can comment on Mr. Wiggins' opening statement and then if Mr. Wiggins saves some of his time, he can make rebuttal argument so that he can comment on Mr. Sapp's argument.

With that, Mr. Wiggins, you may make the Plaintiffs' closing argument.

* * * *

[1748] MR. WIGGINS: Let's be clear. I've told you that the damages are on Exhibits 345 and 346. They range from $50 for various people up to $9,300 is the highest. That's for the—all the activities together. Exhibit 346 breaks out the three minutes for the walking time claim and we ask you to use that as a way of answering about the break time.

In other words, on the break time claim line you will put what the number is on Exhibit 346 and you will subtract from the 6.6 total, 6.6 million total on Exhibit 345 for the other activities so the damages we're asking you to fill in on the Special Verdict Form are for the pre and post-shift $6.6 million and some odd change that's on Exhibit 345 minus the amount—the 415,000 or so on Exhibit 346 and then put that three—Exhibit 346 amount on the second line for the break time.

Let me give you the exact amounts. You will have these exhibits back there, but these are the exhibits I am talking about. Exhibit 345 is the first line and it's got all the individuals listed and their amounts, this is pretax amounts, no interest, that's just the raw backpay, and it says, $6,686,082.36 and we are asking you to award that based on Exhibit 345 to the people listed minus what is on this Exhibit 346, $413,434.71 and

that you put that amount on the second line so it is Exhibit 345 on the first line minus this 413,000 and then put the 413 back in on the second line. That's our—that's what we are asking you as a result of the evidence in [1749] this case. Thank you.

* * * *

[1818] THE COURT: Please be seated. * * * *, I assume that because you are holding the Verdict Form that you must be the foreperson.

* * * *: Yes.

THE COURT: Yes. Has the jury reached a verdict?

* * * *: Yes.

THE COURT: Yes. Is it unanimous, meaning do all the jurors agree to it?

* * * *: Yes.

THE COURT: Yes. Ms. Clerk, please get the Verdict Form. In the matter of Peg Bouaphakeo and others versus Tyson Foods Incorporated, Question No. 1: "Did the Plaintiffs prove that the time spent donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and earplugs is work [1819] within the meaning of the Fair Labor Standards Act?" Answer, "Yes."

Question No. 2, "Did the Plaintiffs prove that donning and doffing the items in Question No. 1 is integral and indispensable to the employees' gang time work?" Answer, "Yes."

Question No. 3, "Is the meal break a bona fide meal period?" Answer, "Yes."

Question No. 4, "Are the donning and doffing activities at issue in this case de minimis as that term is defined in Instruction No. 6?" "No."

Question No. 5, "Did the Plaintiffs prove that they're entitled to additional compensation for any of the donning and doffing activities at issue in this case?" "Yes."

"If yes, indicate how much for the following activities, each activity. Before and after shift, $2,892,378.70."

"During the meal period, zero," because they found it was a bona fide meal period for a total of $2,892,378.70.

The Verdict Form is signed by the foreperson and by all other seven jurors. The Clerk of Court shall file the Verdict Form and enter Judgment accordingly.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

FINAL INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1

INTRODUCTION / DUTIES / BURDEN

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence.

Counsel will quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you of course are to be governed by the instructions.

You are not to judge the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

Whenever a party must prove something, they must do so by the preponderance of the evidence. Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

The fact that the defendant in this lawsuit is a corporation should not affect your decision. All persons are equal before the law and corporations are entitled to the same fair and conscientious decision by you as any other person.

INSTRUCTION NO. 2

EVIDENCE

You shall base your verdict only upon the evidence and these instructions. The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated. The parties have stipulated or agreed that certain facts are true. You must therefore treat those facts as having been proved.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide. The following are not evidence: (1) statements, arguments, questions and comments by the lawyers; (2) objections and rulings on objections; and (3) anything that you saw or heard about this case outside the courtroom.

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable. In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony. There are many factors which you may consider in deciding what testimony to believe, for example: (1) whether the testimony is reasonable and consistent with other evidence you believe; (2) the witness' appearance, willingness and ability to answer questions, conduct, intelligence, memory and knowledge of the facts; (3) whether the witness has given statements in the past that are inconsistent with his or her testimony at trial; and (4) the witness' interest in the trial, their motive, candor, bias and prejudice.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

Expert Witness

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all other evidence in the case.

Representative Evidence

The named plaintiffs bring this case on behalf of themselves and others. In order for non-testifying members of the class to recover, the evidence must

establish that they suffered the same harm as a result of the same unlawful decision or policy. You may not award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid.

Both parties have presented various types of evidence, including stipulations of fact, documents and live testimony of hourly employees, supervisors, experts, and video clips. Not all affected employees need testify for plaintiffs to prove their claims. Rather, if some employees testify about the activities they performed or the amount of unpaid time they worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This kind of evidence called [sic] "representative evidence."

There is no bright-line rule as to the percentage of representative employees necessary; rather, the weight to be accorded the evidence is a function not of its quantity, but of its quality – whether the testimony covers similarly situated workers, and is generally consistent. You may also consider whether the witnesses who testified worked in or with similar positions and similar departments as the non-testifying employees, whether they wore similar sanitary and protective items, whether the testifying employees performed donning and doffing activities similar to non-testifying employees, whether the witnesses who testified had the opportunity or ability to observe the non-testifying employees, and whether there was evidence presented that either was consistent with or was inconsistent with the testimony of the testifying witnesses. The representative evidence, as a whole, must demonstrate that the class is entitled to recover.

INSTRUCTION NO. 3

SUMMARY OF CLAIMS

This is a civil case brought by plaintiffs, on behalf of themselves and other individuals similarly situated as plaintiffs, against the defendant, Tyson Foods, Inc.

Plaintiffs bring their lawsuit pursuant to the Fair Labor Standards Act, referred to in these instructions as the "FLSA" and the Iowa Wage Payment Collection Act. Under both the FLSA and the Iowa Wage Payment Collection Act, an employer must pay overtime compensation in any workweeks in which an employee has more than 40 "hours worked," as defined in Instruction No. 4. Overtime compensation must be paid at a rate at least one and a half times the employee's regular rate of pay for all hours worked in excess of 40.

First, plaintiffs claim that the donning and doffing of hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs constitutes compensable "work." Defendant denies that such activities constitute "work" as defined in the FLSA and contends that it is not liable for it because the activity is "preliminary" and "postliminary" activity and because it is "de minimis" or miniscule.

Second, plaintiffs claim that they are entitled to compensation during their meal period because they donned and doffed clothing and cleaned equipment during this time. Defendant claims that plaintiffs' meal break donning and doffing is not compensable because it is a "bona fide meal period."

Finally, the plaintiffs claim that the amount of compensation paid by the defendant for non-gang time activities was inadequate (whether that be for the

items in their first claim or the items for which "K-Code" has been paid). Defendant contends that it has fully compensated plaintiffs for all such activities. You will decide whether the amount paid by the defendant for these activities fully compensated the plaintiffs.

You are instructed that when an employer knows or has reason to believe that "work" under the FLSA is being performed, it is the responsibility of the employer to compensate employees for such work, even if that work was not specifically requested by the employer to be performed. An employer cannot sit back and accept the benefits of such work without compensating employees for it. It is the duty of management to exercise control and make sure that work is not performed if it does not want it to be performed.

You are further instructed that employees cannot waive their rights under the FLSA. This means that an employee does not lose any right he or she may have to back wages by failing to complain to his or her employer or by any other action.

The plaintiffs in this case make no claim for the time that they were actually on the production line handling the meat at the Storm Lake facility, also known as "gang time." Basing hourly pay in whole or in part on gang time is permissible and the legality of "gang time" is not at issue in this case.

INSTRUCTION NO. 4

FAIR LABOR STANDARDS ACT ELEMENTS

Your verdict must be for plaintiffs and against defendant on plaintiffs' FLSA claim if all of the following elements have been proved. The plaintiffs must prove:

First, plaintiffs were employed by the defendant during the time period involved;

and

Second, defendant failed to pay plaintiffs overtime pay for all hours worked by plaintiffs in excess of 40 in one or more workweeks.

INSTRUCTION NO. 5

FAIR LABOR STANDARDS ACT - DEFINITIONS

Hours Worked

The first issue you will have to decide is whether donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs are "work" within the meaning of the FLSA. The phrase "hours worked" as used in Instruction No. 4 includes all time spent by an employee that involves physical or mental exertion (whether burdensome or not), controlled or required by, and done primarily for the benefit of the employer or the employer's business. Such time constitutes "hours worked" if the employer knew or should have known that the work was being performed. When deciding whether an activity is work, it makes no difference how easy or difficult the activity is. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes are not "hours worked."

Portal-to-Portal Act – Preliminary and Postliminary Activities

The Portal-to-Portal Act is part of the FLSA. It is an exception to the general rule that an employer must pay for all hours worked. It provides that employers are not required to pay overtime for activities which

are preliminary to (before) an employee's first "principal activity" of the day or postliminary to (after) an employee's last principal activity of the day.

A "principal activity" is any work that is both integral and indispensable to the production work for which the employee is employed. To determine whether an activity is integral and indispensable, you must find that (1) the activity is required by the employer; (2) the activity is necessary to the employee's principal activities; and (3) it is for the primary benefit of the employer. When integral and indispensable activities occur pre-shift or post-shift, only the time reasonably spent is compensable.

Continuous Workday

The continuous workday is the period between the commencement and the completion on the same workday of an employee's principal activity or activities.

In general, an employer is required to compensate its employees for their time, beginning when the employee performs the first principal activity of the workday. Pre and post shift activities that are work and that are integral and indispensable to the production work performed by employees are considered principal activities. Only time reasonably spent after the employee engages in the first principal activity and before the employee finishes his or her last principal activity is part of a continuous workday and is compensable under the FLSA.

Walking Time

You are also instructed that an employees' activities including walking time to their department at the start of a shift and the return from their department

at the end of a shift, is compensable when it either follows the first principal activity or first activity that is integral and indispensable to a principal activity or comes before the last principal activity or activity that is integral and indispensable to a principal activity.

Bona Fide Meal Periods

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be relieved from duty for the purpose of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period.

The plaintiffs have the burden to prove that they are entitled to mealtime compensation. Whether an employee is entitled to mealtime compensation depends on whether the meal period as a whole was spent "predominantly for the benefit of the employer" or whether the employee was able to use the meal period effectively for his or her own purposes. The continuous workday described above does not include time spent during a bona fide meal period. A meal period that is interrupted by work is only compensable if the interruption causes employees to spend their meal period primarily for the benefit of the employer.

Short Breaks

The FLSA does not require an employer to provide an employee with breaks during the workday. However, you have heard evidence that Tyson provides its employees with a paid 15 minute break. Payment for the time employees are on these breaks cannot offset any damages for uncompensated "work."

INSTRUCTION NO. 6

DE MINIMIS

Defendant is required to pay for all compensable work unless it proves by a preponderance of the evidence that the work is what is referred to as "de minimis" or minuscule. The defendant contends that even if the donning and doffing of items at issue in this case constitutes "work," it is not compensable because it occupies such a short period of time.

The "de minimis" rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes. Employers must compensate employees for even small amounts of time, unless the time is so minuscule that it cannot as a practical administrative matter be recorded for payroll purposes. When deciding whether time is "de minimis," all of the compensable time that was not paid during the day, including walking time, should be added together and you should also consider the aggregate size of the claim as a whole.

The following factors are considered in determining whether work activities are "de minimis":

(1) The practical administrative difficulty of recording the uncompensated time;

(2) The aggregate amount of uncompensated time; and

(3) The regularity of the uncompensated work.

Defendant must prove this defense by a preponderance of the evidence.

There is no precise amount of time that may be denied compensation as "de minimis." No rigid rule

can be applied with mathematical certainty. Rather, common sense must be applied to the facts of this case.

INSTRUCTION NO. 7

IOWA WAGE PAYMENT COLLECTION LAW

The Iowa Wage Payment Collection Law is a law of the State of Iowa. The Iowa Wage Payment Collection law is meant to facilitate the public policy of allowing employees to collect wages owed to them by their employers.

For purposes of this trial, plaintiffs' claims under the Iowa Wage Payment Collection Law are duplicative of their claims under the FLSA. Although the Iowa claim applies to a larger number of employees and a shorter period of time than the federal claim, the elements of the Iowa claim, that is, what the plaintiffs must prove, are the same as the federal claim.

INSTRUCTION NO. 8

DAMAGES GENERALLY

If you find in favor of the plaintiffs on one or more of their claims, then the plaintiffs are entitled to recover damages. Keep in mind that in determining damages, you must use your sound judgment based upon impartial consideration of the evidence. The amount you assess for any item of damage must not exceed the amount caused by the opposing party as proved by the evidence. In awarding damages, you must not engage in speculation, guess or conjecture. The damages must also have a reasonable basis in the evidence, but need not be proven with precision. Also, your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against the parties.

QUOTIENT VERDICT

In arriving at an item of damage you cannot arrive at a figure by taking down an estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates shall be your item of damage.

FLSA DAMAGES

With respect to plaintiffs' first claim, that is, the compensability of donning and doffing standard or non-unique sanitary items, if you find that plaintiffs have proven their claim, and that the defendant has failed to prove that the plaintiffs' donning and doffing of standard sanitary items was *de minimis*, then you must turn to the question of damages.

With respect to plaintiffs' second claim, the compensability of time spent during the meal period donning, doffing, and sanitizing clothing and equipment, if you find that the plaintiffs have proved their claim, and that it was not a bona fide meal period, then you must turn to the question of damages.

Finally, with respect to plaintiffs' final claim, the adequacy of the compensation paid for donning, doffing, and sanitizing clothing and equipment, if you find for plaintiffs on this claim, and the defendant has not proved its *de minimis* defense, then you must turn to the question of damages.

The law requires employers to make and keep records of wages, hours, and conditions of employment but it does not require employers to use time clocks. If the employer does not keep records of the amount of time spent on the activities at issue, plaintiffs carry their burden to prove damages if they prove that the employees have in fact performed work for which they

were not paid and produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference.

The burden then shifts to the defendant to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from plaintiffs' evidence. If the defendant fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.

Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages. If you find that such compensation was not sufficient to cover all of the activities at issue, all uncompensated work should be taken into account in calculating damages.

Again, the overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times one and one-half the regular rate for the workweek.

In determining the amount of damages, you may not include or add to the damages any sum for the purpose of punishing defendant.

INSTRUCTION NO. 9

DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Your verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you each [sic] in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court

security officer that you are ready to return to the courtroom.

DATED this 23rd day of September, 2011.

/s/ John A. Jarvey
JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

RESPONSE TO JUROR QUESTION

MEMBERS OF THE JURY:

I have received a note signed by one juror, a copy of which is attached. In your note, you ask the following question:

> If we find for the plaintiff, can we award a lesser amount or is the case strictly for specified amount?

In response to your note, I state the following:

> Please proceed to elect a foreperson and discuss these matters among yourselves. Your question is answered in the first paragraph of Instruction No. 8.

DATED this 23rd day of September, 2011.

/s/ John A. Jarvey
JOHN A. JARVEY
U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 5:07cv04009-JAJ

PEG BOUAPHAKEO, MARIO MARTINEZ, JAVIER FRAYRE, HERIBENTO RENTERIA, JESUS A. MONTES, and JOSE A. GARCIA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

TYSON FOODS, INC.,

Defendant.

VERDICT FORM

Question No. 1

Did the plaintiffs prove that the time spent donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs is "work" within the meaning of the FLSA? (See Instruction No. 5, page 10.)

Yes ✓ No ___

(If your answer to Question No. 1 is "NO," do not award damages for donning and doffing these items and proceed to Question No. 3.)

Question No. 2

Did the plaintiffs prove that donning and doffing the items in Question No. 1 is "integral and indispensable" to the employees' gang-time work? (See Instruction No. 5, page 10.)

Yes ✓ No ___

(If your answer to Question No. 2 is "NO," do not award damages for donning and doffing these items.)

Question No. 3

Is the meal break a bona fide meal period? (See Instruction No. 5, pages 11-12.)

Yes ✓ No ___

(If your answer to Question No. 3 is "YES," do not award damages for activity occurring during the meal period.)

Question No. 4

Are the donning and doffing activities at issue in this case "de minimis" as that term is defined in Instruction No. 6? (See Instruction No. 6, page 13.)

Yes ___ No ✓

(If your answer to Question No. 4 is "YES," do not answer Question No. 5.)

Question No. 5

Did the plaintiffs prove that they are entitled to additional compensation for any of the donning and doffing activities at issue in this case?

Yes ✓ No ___

If the answer to question No. 5 is "YES," indicate how much you award for each activity:

Before and After Shift	$ 2,892,378.70
During the Meal Period	$ 0
Total	$ 2,892,378.70

Date: Sept. 28, 2011

_____
Foreperson

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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August 7, 2015

QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

PARTIES TO THE PROCEEDING

The petitioner is Tyson Foods, Inc. ("Tyson"), and respondents are Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, who filed suit on behalf of themselves and other similarly situated individuals at Tyson's pork-processing plant in Storm Lake, Iowa.

RULE 26.9 STATEMENT

Tyson has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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7B Wright & Miller, *Federal Practice and Procedure* (3d ed. 2005)..... 27

3 William B. Rubenstein, *Newberg on Class Actions* (5th ed. 2015)..... 38

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The court of appeals' opinion is reported at 765 F.3d 791 and reproduced at Pet.App. 1a–24a. That court's unpublished order denying rehearing is reproduced at Pet.App. 114a–131a. The district court's unpublished orders denying Tyson's motion to decertify the class and Tyson's post-trial motion are reproduced at Pet.App. 25a–30a and 31a–38a. The district court's opinion granting conditional collective and class certification is reported at 564 F. Supp. 2d 870 and is reproduced at Pet.App. 41a–113a.

JURISDICTION

The court of appeals entered judgment on August 25, 2014, Pet.App. 1a, and denied rehearing on November 19, 2014, Pet.App. 114a. On January 29, 2015, Justice Alito extended the time for filing a petition for certiorari to and including March 19, 2015. Tyson filed its petition for certiorari on March 19, 2015. This Court granted the petition on June 8, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES

This case involves Federal Rule of Civil Procedure 23(b)(3) and the Fair Labor Standards Act ("FLSA") provisions that authorize a private cause of action for damages for unpaid overtime compensation, 29 U.S.C. §§207(a), 216(b), which are reproduced at Pet.App. 132a–136a.

INTRODUCTION

The decision in this case is the product of a judicial mindset concerning class actions (and collective actions) that persists despite this Court's recent and

repeated insistence on the need for greater judicial discipline in class certification decisions. This Court has explained that a class should not be certified until the court concludes, "'after a rigorous analysis,'" that the four prerequisites of Rule 23(a)—numerosity, typicality, commonality, and adequacy of representation—are met. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S.Ct. 2541, 2551 (2011). For cases brought under Rule 23(b)(3), the inquiry into whether common questions will predominate over individualized issues "is even more demanding." *Comcast Corp.* v. *Behrend*, 133 S.Ct. 1426, 1432 (2013). The predominance inquiry must begin "with the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011), and focus on whether the requirements to prove the claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust*, 133 S.Ct. 1184, 1197 (2013).

Faithful adherence to these requirements would have precluded certification in this case. Plaintiffs are hourly workers at a pork-processing facility who sought overtime compensation and liquidated damages under the FLSA and Iowa law on the theory that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and rinsing personal protective equipment and walking to and from their work stations. There were significant differences, however, in the types of personal protective equipment individual workers wore, with corresponding differences in the amount of time each spent on these activities. There were also differences in the amount of time Tyson compensated individual workers for donning and doffing-related

activities, and differences in the total number of hours individual workers spent on other work activities in any given week. As a result, questions of whether individual workers were deprived of any overtime compensation—and if so, how much—overwhelmed any common legal questions concerning whether those activities were compensable "work."

The district court nevertheless certified a class of over 3,000 employees, concluding that the legality of the compensation system was a common question that predominated over individualized questions of injury or damages. The district court then allowed plaintiffs to airbrush these individualized issues out of the case. It permitted plaintiffs to "prove" classwide liability and damages with purportedly "common" statistical evidence that erroneously presumed that *all* class members were identical to a fictional "average" employee.

On appeal, the majority saw its task as distinguishing, rather than enforcing, this Court's recent holdings. "Unlike *Dukes*," the majority stated, "Tyson had a specific company policy [gang time] that applied to all class members." Pet.App. 8a. "Unlike *Dukes*, class members worked at the same plant and used similar equipment." *Id.* And "[u]sing statistics or samples in litigation is not necessarily trial by formula," as condemned in *Wal-Mart* v. *Dukes*. *Id.* at 10a–11a. Far from reflecting a rigorous predominance analysis, these observations simply ignored the many individualized issues inherent in plaintiffs' claims. As a result, Tyson was found liable based on an "undifferentiated presentation[] of evidence," and the jury announced a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* 24a (Beam, J. dissenting).

The majority's affirmance of this unjust result should be reversed. Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were. And this Court's decisions do not permit courts to ignore the factual differences among class members that require individualized inquiry or to use statistics to eliminate the legal significance of such differences solely to allow Rule 23(b)(3)'s predominance standard to be met. The lower courts' lax approach to class certification effectively deprived Tyson of its due process right to raise every available defense, and impermissibly altered substantive rights in violation of the Rules Enabling Act, 28 U.S.C. §2072.

STATEMENT OF THE CASE

1. Plaintiffs are current and former hourly employees at Tyson's Storm Lake, Iowa, pork-processing plant. J.A.117–118. These line employees worked in two areas: on the Slaughter (or "Kill") floor and on the Processing (or "Fabrication") floor. *Id.*

The Storm Lake facility employs approximately 1,300 employees, doing more than 420 distinct jobs over two shifts. J.A.117–118; J.A.74–85. Each position requires the job-holder to perform certain duties and to wear different sanitary items and personal protective equipment ("PPE"). J.A.118–119; J.A.126–138.

All employees wear a hard hat, hairnet, and ear protection while on the production floor, J.A.119, but the similarities end there. Processing employees wear a frock, like a butcher's smock, while Slaughter employees wear a company-issued white shirt-and-pants uniform, *id.*, or their own comparable clothing, J.A.199, 438.

Additional items worn by employees depend on the employee's job, J.A.61, 119, and personal preference, J.A.167, 237, 241, 246. Knife-wielding employees in both areas don and doff, in varying combination, plastic belly guards, mesh sleeves, plexiglass arm guards, Polar gloves, Polar sleeves, scabbards (or sheaths) for their knives, and steels with which to maintain them.[1] J.A.118. Some non-knife users, in contrast, choose to wear rubber gloves, cotton gloves, or plastic aprons. J.A.119, 167–68, 201–204, 273–74, 293, 295–296. Further, employees in both departments regularly elect to wear other Tyson-provided items as a matter of personal preference. See J.A.167–168, 189, 196, 274, 293, 295–296. Thus, even employees working precisely the same job may be attired quite differently. J.A.195–96, 201–204, 206–207, 328–330.

Depending on their attire and equipment, employees have different clean-up responsibilities with respect to their personal protective equipment. For instance, knife-wielding employees must rinse their knives, scabbards, belly guards, and other "hard equipment" when their shifts end. J.A.156, 179, 222. Other equipment, such as the rubber apron, gloves, or sleeves, need only be placed in a laundry bag. J.A.179–180, 227, 264. Those items are then washed by Tyson before the employees' next shift. J.A.180, 300.

2. This case is brought by employees paid on Tyson's "gang-time" system, which compensates them from the time the first piece of product passes their work stations until the last piece of product passes. J.A.171. Tyson also pays a fixed amount of extra time

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[1] Approximately 70 percent of the class were knife-wielding employees. J.A.210.

each day called "K-Code time" (because it is given to employees in departments using knives), Pet.App. 2a, that compensates employees for donning/doffing-related activities.

From the beginning of the limitations periods until February 2007, Tyson paid four minutes of K-Code time per day to each employee who worked in a department in which a knife was used.[2] J.A.121. From February 2007 to June 28, 2010, Tyson paid only knife-wielding employees K-Code time of four to eight minutes (depending on their specific job for the shift). *Id.*

In addition, some class members were compensated for these donning, doffing, rinsing, and walking activities above and beyond K-Code payments. Specifically, employees who were assigned to come in early to setup or stay late to teardown after gang time were paid for the additional time, J.A.249, 433, and were able to don/doff and clean their gear and walk to/from the work station during that period of time, J.A.433–434; J.A.60; J.A.68, 70; J.A.90.

3. Plaintiffs filed this action in 2007 for themselves and other "similarly situated individuals," alleging that Tyson failed to compensate its employees for overtime work, in violation of the FLSA, 29 U.S.C. §207, and the Iowa Wage Payment Collection Law, Iowa Code §91A.1, *et seq.*, which provides a state-law basis to recover for FLSA claims. J.A.28, 39–40. Plaintiffs did not challenge the gang-time system *per se*, nor did they argue that Tyson failed to pay the

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[2] The Slaughter and Processing floors were mainly comprised of such departments; thus, most class members who worked during this time period would have received four minutes per day they were on the job, regardless of whether they actually worked a knife job. J.A.121.

federal minimum wage. They claimed, however, that the K-Code times were too low and, thus, that they were entitled to overtime compensation for unpaid time spent on donning/doffing, washing, and walking when those activities were undertaken by an employee who worked more than 40 hours in a workweek. J.A.35–39.

Plaintiffs moved to certify a Rule 23(b)(3) class and an FLSA collective action. Tyson objected, arguing that liability and damages could be determined only on an individual basis. The district court agreed that "there [we]re some very big factual differences among hourly employees at Tyson"; it recognized that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet.App. 87a. In particular, the court noted the declarations of 14 Tyson supervisors, who described the required personal protective equipment worn by their workers in different sub-departments, *id.* at 86a–87a, equipment that ranged from the standard hard hat, hairnet, and ear protection to the full body armor (belly guard, mesh glove, polar sleeves, and a plastic arm guard) within even a single sub-department, see J.A.53; J.A.61; J.A.74–85. Those affidavits also explained how Tyson requires different employees to remove different articles of equipment before entering the cafeteria during their breaks, J.A.71, and how there are different requirements for cleaning equipment at the end of the shift, J.A.64; J.A.87; J.A.90.

Nevertheless, the court viewed the unchallenged "gang time compensation system" as a "'tie that binds'" the class together under a single, common question of law. Pet.App.87a. Because all class members, in the court's view, "need[ed] to prove that they [were] not paid for all the work they perform

under Tyson's gang time compensation system," Pet.App. 109a, it certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members, all of whom are also members of the Rule 23 class, Pet. App. 110–111a; J.A.117.

4. After this Court decided *Wal-Mart Stores, Inc.* v. *Dukes*, Tyson filed a motion to decertify the Rule 23 class. J.A.10 (Dkt. 212). Tyson asserted that decertification was necessary because plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution ... in one stroke." Dkt. 212-1, at 5 (quoting *Wal-Mart*, 131 S.Ct at 2551).

Plaintiffs opposed decertification, asserting, first, that they could prove Tyson undercompensated the class members with a time study by Dr. Kenneth Mericle that purported to show the "average" amount of time Tyson employees spent on donning/doffing-related activities. Dkt. 223-1, at 22. Specifically, Mericle identified eight donning/doffing-related "activities" on the Processing side and six on the Slaughter side, such as donning equipment in the locker room before the shift and washing knife-related equipment after the shift. J.A.142–43. He and his videographers stationed themselves at various points in the plant and then recorded the employees who performed those activities in their view without differentiating by position or articles of personal protective equipment. J.A.336–37, 359–60. Mericle measured how much time each employee in the videos took for each of these activities, *e.g.*, donning *all* equipment, rather than how much time it took an employee to don each separate piece of equipment, *e.g.*, a belly guard. J.A.377. He then purported to compute the average time for each of the

donning/doffing-related activities he identified, added an estimated walking time, and summed them for an "all-in" average of 18 minutes on the Processing floor and 21.25 minutes on the Slaughter floor. J.A.123–124.

Second, plaintiffs said they would calculate entitlement to overtime compensation and damages with a report by Dr. Liesl Fox. Fox assumed that *all* class members spent Mericle's average amount of time donning, doffing, and rinsing their equipment and walking to their work stations—*i.e.*, that everyone on the Processing floor spent 18 minutes and everyone on the Slaughter floor spent 21.25 minutes on these activities. Then, using a computer program and Tyson's pay records, she determined how much overtime compensation an employee would be due, if any, if he or she were credited for Mericle's average donning/doffing time each workday during the class period. J.A.404–408. Finally, Fox totaled those numbers to arrive at an aggregate damages award for each class. J.A.139.

Tyson objected that this purported proof would result in a "trial by formula" expressly prohibited by a unanimous Court in *Wal-Mart*. Dkt. 212-1, at 10–12. Whether an employee was entitled to overtime pay, Tyson argued, could be determined only on an individualized basis because the employees worked different jobs that required them to don, doff, and rinse different equipment in a different order over different amounts of time. Dkt. 237, at 11. To determine Tyson's liability and damages based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated the company's right to demonstrate that *individual* class members were not entitled to overtime. *Id.* at 5.

The district court denied Tyson's motion, finding that whether "donning and doffing and/or sanitizing of the PPE ... constitutes 'work'" was a common question susceptible to common proof. Pet.App. 37a. The court observed, without elaboration, that there were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id.*

5. At trial, however, the few class members who testified admitted that Tyson required employees to wear different personal protective equipment, depending on their job, and that employees chose to wear different items, depending on their personal preferences. J.A.276–277 (Lovan); J.A.283–284 (Balderas); J.A.315 (Brown). In fact, each testifying class member indicated that he was personally required to wear different equipment and that each chose to wear additional items. J.A.256–257 (Lovan); J.A.293–295 (Balderas); J.A.315 (Brown); see also J.A.125–138 (chart listing the required personal protective equipment for each job in the plant).

Additionally, these employees testified that they don and doff these pieces of equipment in a different order, in different places, and that each piece requires a distinct amount of time. J.A.272, 297–302, 308–309, 318–319. As a result, it took them a different amount of time to perform each of Dr. Mericle's "activities," and none of them matched Mericle's "averages." For example, Mr. Lovan testified that it took him eight to nine minutes to don his protective equipment and walk to his work station, J.A.260; it took Mr. Balderas ten to twelve, J.A.288, and Mr. Brown approximately five minutes, J.A.309. Notably, when each of the employees broke down each element of his pre-shift routine on cross-examination, he revised his estimates further

downwards. J.A.270–272 (Lovan); J.A.297, 301–302 (Balderas); J.A.316–319 (Brown).

Nevertheless, plaintiffs purported to prove class members' entitlement to overtime compensation with Mericle's testimony regarding his average time study. Mericle conceded that his time measurements necessarily included employees who performed different jobs and donned and doffed different equipment. J.A.349–350, 351, 383. This resulted in "a lot of variation." J.A.387. For instance, when Mericle measured the pre-shift donning of equipment by Processing floor employees in the locker room, his observed times ranged from approximately 30 seconds to ten minutes. J.A.142. On the Slaughter side, he similarly observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift. J.A.143.

Mericle conceded that this wide disparity—which repeated itself with each "activity" measured—was because "some of [the workers] put on more equipment than others." J.A.385–386. On the Processing floor, for example, Tyson required the employee in one position to wear one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one Plexiglass arm guard. J.A.241. In contrast, the employee in another position (also on the same Processing floor) needed to don none of these pieces, J.A.242. On the Slaughter floor, the variations are just as stark. For instance, the "Stickers" must "wear one mesh glove, a face shield, a mesh apron, plastic gloves, and an arm guard," while "[t]he Stunners are not required to wear anything." J.A.61.

Even beyond those problems, Mericle made no attempt to ensure that his time study was based on a statistically representative sample of class members.

J.A.359 (Mericle agreeing that he did not analyze a "random sample"). By his own admission, Mericle did not pre-select workers from a variety of jobs. J.A.378–381. Instead, he and his team observed whichever employees were performing a certain activity at a given time, allowing the employees to "self-select" into his study. J.A.359. Thus, for example, he made no effort to control for all the different combinations of equipment worn by individual workers, differences that resulted both from variations in the equipment required for different jobs and variation in optional equipment individual workers chose to wear. *Id.* And he did not limit his study to employees who donned and doffed their equipment in a deliberate manner without stopping to chat with co-workers. J.A.358, 385.

Mericle also measured employees continuing to don equipment once they were on the disassembly line (and, thus, already on paid gang-time), yet he included them in his computations. J.A.369. He did not account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or teardown responsibilities. J.A.433. And he included in his average times 1.30 minutes and 2.37 minutes for cleaning knife-related equipment at the end of the shift in the Processing Floor and Slaughter Floor, respectively, see J.A.123–124, even though not all employees had to rinse their equipment at the end of their shift. Compare J.A.222 (listing items of hard equipment needed for knife-wielding jobs that employees have to rinse after their shifts), with J.A.226–227 (listing items that employees do not have to rinse but simply place in a laundry bag for the plant to wash).

Plaintiffs used Mericle's flawed averages to prove liability and to calculate damages. Their damages expert, Dr. Fox, testified that classwide damages were $6,686,082.36 for the Rule 23 class and $1,611,702.44 for the FLSA collective if one assumed that every class member worked Mericle's "average" times. J.A.410, 417–418; J.A.139. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, washing, and walking. J.A.419. For instance, at the direction of plaintiffs' counsel, Fox calculated damages assuming that these activities took each employee 15 minutes. J.A.411–412. This small subtraction from Mericle's average time dropped the Rule 23 class's damages by approximately $1.8 million. Compare J.A.139 with J.A.415.

Fox also acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included over 212 members who suffered no injury at all; even adding the estimated time did not result in those employees working any unpaid overtime. J.A.415. She further explained that, as Mericle's average donning/doffing times are reduced, the number of uninjured workers would increase as more employees' work hours fell below 40 for a given week or they were fully compensated by the K-Code time they received. J.A.424–425. For example, when Fox recalculated damages for the Rule 23 class using a time of 15 minutes, the number of employees allegedly owed compensation dropped by another 110. Compare J.A.139 with J.A.141. Moreover, she testified that this drop-off happens in a non-linear fashion, J.A.424–425, so her calculations were "all or nothing," meaning that "if the jury concludes the activities take

[a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result" without re-running the program, J.A.425.

At the close of plaintiffs' case, Tyson asked the court to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. J.A.14 (Dkt. 270). The district court summarily denied the motion, trial continued, and the case was submitted to the jury.

6. The jury found that the class members were "'entitled to additional compensation for ... the donning and doffing activities at issue in this case," and awarded damages in the amount of $2,892,378.70, substantially less than Fox had calculated for the Rule 23 class. J.A.467.

After the verdict, Tyson requested judgment as a matter of law and renewed its motion for decertification of the class. The undisputed trial testimony showed that the class contained employees from numerous departments, "all of which were comprised of many different positions, all requiring different combinations of required and optional safety or sanitary items." Dkt. 304-1, at 9. These individual differences and Mericle's failure to account for them in his study, Tyson contended, meant that Mericle's average times did not establish whether any given employee was actually undercompensated. *Id.* at 10. Moreover, Fox's testimony established that there are at least 212 class members who had zero uncompensated overtime, and the actual number of uninjured employees was much higher. Because the jury awarded a damages figure less than Fox calculated, it necessarily found that Mericle's average times were overstated and, as Fox conceded at trial, the number of uninjured class members rises if one

assumes that the amount of time spent on donning/doffing, cleaning, and walking activities is less than Mericle calculated. *Id.* at 13 (citing J.A.415). Nonetheless, these uninjured plaintiffs were included in the aggregate damages award, now making it impossible to award damages accurately after the jury rejected Fox's "all or nothing" damages total. *Id.* at 13–14.

The district court denied Tyson's motion, saying that "there [was] not a complete absence of probative facts to support the [jury's] conclusion, nor did a miscarriage of justice occur." Pet.App. at 30a.

7. On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that "individual plaintiffs varied in their donning and doffing routines," Pet.App. 8a, and that plaintiffs "rel[ied] on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated "work" time, *id.* at 11a. The majority reasoned, however, that because "Tyson had a specific company policy" and the "class members worked at the same plant and used similar equipment," "this inference [was] allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 ... (1946)." *Id.* at 8a. In the majority's view, plaintiffs' application of Mericle's averaged donning/doffing times to individual "employee time records to establish individual damages" meant that "[t]hey [had] prove[d] liability for the class as a whole." *Id.* at 10a.

The majority also rejected Tyson's argument that decertification was necessary "because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." Pet.App. 8a. The majority said "Tyson exaggerate[d] the [legal] authority for its contention,"

id. at 9a, but provided no further elaboration of this "exaggeration."

Judge Beam dissented. He emphasized the myriad differences between the class members, "differences in [their] donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation [and] other relevant factors." Pet.App. 23a (Beam, J., dissenting). "While ... all class members were subject to a common policy—gang-time payment," there could be "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because Tyson, by issuing K-Code time, had already paid for donning and doffing in many instances and because the amount of time individual employees spent donning and doffing varied. *Id.* Thus, the common evidence could not "resolve[] [the case] in 'one stroke,'" *id.* (quoting *Wal-Mart*, 131 S.Ct. at 2551), and the class "should have been decertified," *id.*

In addition, Judge Beam found that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees. Pet.App. 22a. As he noted, "the jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* Consequently, by certifying a class with hundreds of uninjured employees, the district court would force Tyson to pay employees whom it had fully compensated, a result that would be unfair to Tyson and any class members who actually were injured. *Id.*

8. Tyson's petition for rehearing or rehearing *en banc* was denied by a vote of 6 to 5. In an opinion

respecting the denial of rehearing, Judge Benton stated his view that "*Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context" and that plaintiffs implicitly satisfied this standard by proffering expert testimony of classwide average donning/doffing times. Pet.App. 127a–128a & n.5 (Benton, J., respecting the denial of rehr'g *en banc*). He also concluded that "Tyson has no interest in how the fund is allocated among class members," so it is not relevant to the appeal that hundreds of uninjured employees were included in the class. *Id.* at 131a.

Again, Judge Beam dissented, decrying the court's affirmance of "a professionally assembled class action lurching out of control." Pet.App. 115a (Beam, J., dissenting from denial of rehr'g). First, the dissent faulted the majority for misreading *Mt. Clemens*, which allows the use of a "just and reasonable inference" in determining damages, but *only after* plaintiffs carry the "individual burden of [proving] by a preponderance of the evidence" that "each putative class member" "performed work for which he was not properly compensated." *Id.* at 120a (internal quotation marks omitted). Applying that inference at the liability stage by using an average donning/doffing time, the dissent argued, relieved plaintiffs of their burden and resulted in awarding damages to hundreds of uninjured plaintiffs. *Id.* at 120a–121a.

Second, the dissent emphasized that the inclusion of these uninjured employees in the class—when paired with the jury's reduced aggregate damages award—underscored the inappropriateness of certifying the class in the first instance. By awarding substantially less than plaintiffs' experts advocated, the jury necessarily found Mericle's time estimates

inflated. As a result, "well more than one-half the certified class of 3,344 persons have no damages whatsoever and the balance have markedly lower damages that are now virtually impossible to accurately calculate." Pet.App. 125a. By upholding the district court's class certification, the entire class—including the hundreds of members with "no provable damages"—were made "joint beneficiaries" of the "lump sum district court judgment" but without a means to limit distributions for only proven damages. *Id.*

SUMMARY OF ARGUMENT

I. The district court certified the class and collective action, and the panel majority affirmed, without conducting the rigorous analysis necessary to ensure that the employees were "similarly situated," 29 U.S.C. §216(b), and that questions of law or fact common to the class predominated over individual questions, Fed. R. Civ. P. 23(b)(3). Although the lower courts acknowledged that there were significant differences in the personal protective equipment worn by individual class members, the courts thought common questions predominated because all were paid under Tyson's "gang time" compensation system that allegedly failed to compensate them for all time spent on donning/doffing-related activities. That predominance analysis was fundamentally flawed because it ignored the elements of the FLSA cause of action that plaintiffs would have to prove at trial, and had no way to deal with the individual differences that are critical to a proper determination of each class member's proof of liability and entitlement to damages. See *infra* §I.A.

To prove liability and damages under the FLSA, plaintiffs must do more than show that the

challenged donning and doffing-related activities are "work" that must be included in the computation of the 40-hour "workweek." 29 U.S.C. §207(a)(1). Plaintiffs also must show that they worked more than 40 hours without receiving overtime compensation of at least "one and one-half times the regular rate" of pay. *Id.* The latter showing cannot be made with common evidence because individual class members wear different combinations of personal protective equipment that take varying amounts of time to don, doff, and rinse. See *infra* §I.B.

Having failed to recognize that individual questions play a critical role in the determination of liability and damages, the lower courts then compounded their error by allowing plaintiffs to "prove" injury and damages on a classwide basis with statistical sampling that masked these individual differences. No court would allow an individual employee to prove that *he* worked unpaid overtime by submitting evidence of the amount of time worked by *other* employees who did different activities that took a different amount of time to perform. Yet plaintiffs were allowed to "prove" classwide liability and damages by applying Mericle's average donning/doffing times to all class members even though those averages do not reflect the actual time worked by any class member. *Wal-Mart* makes clear that such a "Trial by Formula" violated Tyson's due process right to raise every available defense, and lowered plaintiffs' burden of proof in violation of the Rules Enabling Act, 28 U.S.C. §2072(b). See *infra* §I.C.

The panel majority affirmed this unjust judgment because it thought this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, permitted this use of averaging in these circumstances. It does not. *Mt.*

Clemens held only that an employee carries his burden of proving entitlement to damages under the FLSA "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. 680, 687 (1946). But an employee does not prove that *he* performed overtime work for which he was not properly compensated with evidence of the amount of time worked by a *fictional "average" employee* derived from a sample of different employees who did activities that took different amounts of time to perform. As the Seventh Circuit has explained, that approach confers a "windfall" on some class members while "undercompensat[ing]" others. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013). Class certification and the classwide judgment based on such averaging cannot stand. See *infra* §I.D.

II. The decision below is fatally flawed for another, independent reason. The class and collective action includes hundreds of uninjured class members who are beneficiaries of the nearly $6 million class judgment. The federal courts have no authority to provide damages to individuals with no injury. Article III only permits federal courts to provide redress for an "injury in fact" that is traceable to the conduct of the defendant. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The FLSA likewise assigns federal courts the role of providing damages to employees who were injured by working overtime without receiving extra compensation. 29 U.S.C. §216(b). The procedural device of a class action or collective action cannot expand the jurisdiction of the federal courts or authorize the award of damages to a person who is not injured. See *infra* §II.A.

Accordingly, constitutional and statutory standing requirements permit a court to certify a class only if plaintiffs show (1) that they can prove with common evidence that *all* class members were injured, or (2) that there is a mechanism for identifying the uninjured class members and ensuring that they do not contribute to the size of the damages award and cannot recover damages. In the absence of either showing, common issues cannot predominate—individualized showings will be necessary to determine whether a particular class member is entitled to relief. And proceeding with class litigation in the absence of such showings will result in a trial that alters substantive rights, provides damages to those who are not injured, and deprives the defendant of its due process right to raise every available defense. This rigorous scrutiny must occur *before* the class is certified, and the court must be willing to reconsider its certification decision if it later appears that plaintiffs' proof is insufficient to establish classwide injury or the culling mechanism is unworkable or inadequate. See *infra* §II.B.

No such culling mechanism was used here even though plaintiffs' own damages expert acknowledged that there are hundreds of class members who worked no unpaid overtime and, thus, were not entitled to additional compensation. As a result, class members who worked no unpaid overtime are now beneficiaries of the jury's lump-sum verdict that the district court reduced to a lump-sum judgment in favor of the class. That judgment exceeds the authority of the federal courts under Article III and the FLSA and must be reversed. See *infra* §II.C.

ARGUMENT

I. A RULE 23 CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED BASED ON STATISTICAL EVIDENCE THAT MASKS, RATHER THAN ACCOUNTS FOR, DIFFERENCES AMONG INDIVIDUAL CLASS MEMBERS.

The district court failed to conduct the rigorous analysis required by this Court before certifying the class and collective action, and the panel majority below committed the same error in affirming. A proper analysis would have foreclosed certification in this case. Instead, the lower courts compounded their certification error by permitting plaintiffs to use statistical evidence to mask the fatal dissimilarities among class members. These errors require reversal of the decision below.

A. Prior To Certification Of A Rule 23(b)(3) Class Or A FLSA Collective Action, The Court Must Conduct A Rigorous Analysis Based On The Relevant Cause Of Action.

1. As this Court has repeatedly noted, the "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S.Ct. at 1432 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)); *Wal-Mart*, 131 S.Ct. at 2550 (same). Accordingly, when plaintiffs invoke that exception, courts must conduct "'a rigorous analysis'" to ensure that plaintiffs can satisfy the requisites of Rule 23(a)—*i.e.*, that there "are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation. *Wal-Mart*, 131 S.Ct. at 2551–52 (emphasis in original).

And when plaintiffs seek certification of a damages action, the inquiry under Rule 23(b)(3) "is even more demanding." *Comcast*, 133 S.Ct. at 1432.

Subsection (b)(3) is the "'most adventuresome' innovation" of the 1966 amendments to Rule 23, "[f]ramed for situations in which 'class-action treatment is not as clearly called' for as it is in Rule 23(b)(1) and (b)(2)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613–15 (1997). It permits class certification where "the questions of law or fact common to the class predominate over any questions affecting only individual members," and "a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The predominance requirement "'invites a close look at the case before it is accepted as a class action.'" *Amchem*, 521 U.S. at 615. The determination whether "'questions of law or fact common to class members predominate'" must begin "with the elements of the underlying cause of action." *Halliburton*, 131 S.Ct. at 2184. Focusing "on the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem*, 521 U.S. at 623, a court must ask whether "a proposed class is 'sufficiently cohesive to warrant adjudication by representation,'" *Amgen*, 133 S.Ct. at 1196–97 (quoting *Amchem*, 521 U.S. at 623). Such a finding cannot be made if the requirements to prove the underlying claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Id.* at 1197.

It is therefore essential that any analysis of the predominance requirement go beyond identifying the similarities among class members and the common questions that exist. Common questions do not

predominate simply because there are many similarities among class members and one or more important common legal questions. "The problem with this 'predominance' approach is that the extent of *dissimilarity* among class members' circumstances turns out to be a much more important indicator of whether claims are suitable for class action treatment than the extent of any similarity." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1001–02 (2005) (emphasis added).

Thus, in addition to identifying the common questions, the predominance analysis also must acknowledge the dissimilarities and identify a way to resolve the individual questions they present in a manner that is fair to the defendant and all class members and consistent with the applicable substantive law. *Id.* at 1045. Unless the court has a mechanism available that will fairly and accurately resolve the individual questions, it cannot have any assurance that the common questions do, in fact, predominate.

Because a damages class action may be certified only if plaintiffs prove that "*in fact*" the "'questions of law or fact common to class members predominate over any questions affecting only individual members,'" *Comcast*, 133 S.Ct. at 1432 (quoting Fed. R. Civ. P. 23(b)(3)), the plan for resolving the individual questions as well as the common ones must exist *before* the class is certified. Certification of a large class puts pressure on the defendant to settle, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), and certification of a class that cannot fairly be litigated "injects the unfairness of potential litigation into the terms of the settlement,' Erbsen, *supra*, at 1022–23. See also *Amchem*, 521 U.S. at 621

(if a class is certified "despite the impossibility of litigation," counsel would be "disarmed" because they "could not use the threat of litigation to press for a better offer").

Finally, if the case does not settle, it is essential that a court remain willing to revisit the predominance question as the facts of the case develop. Interlocutory review of a certification decision is rare. See 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* §7.2 (10th ed. 2013). And courts of appeals are reluctant to overturn jury verdicts following full trials. But, as this case illustrates, *infra* §I.B.2, the lack of predominance often becomes clear (or clearer) after discovery or during trial. When that occurs, the class must be modified or decertified. See Fed. R. Civ. P. 23(c)(1)(C) (class certification order "may be altered or amended before final judgment"); *Boucher* v. *Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("courts are 'required to reassess their class rulings as the case develops'"); *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980) (court must be prepared to decertify the class "if the course of trial on the merits reveals the impropriety of class action maintenance").

2. Although the Court has not addressed the issue, the standards governing certification of a collective action under the FLSA can be no less stringent. The FLSA authorizes one or more employees to bring an action "in behalf of himself or themselves and other employees similarly situated" to recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." 29 U.S.C. §216(b). Unlike Rule 23(b)(3), which requires class members to opt out if they do not want to be

covered by the lawsuit, the FLSA collective action provision requires employees to opt into the lawsuit by filing written consent "to become such a party." *Id.* Notwithstanding this difference, a collective action is no less an exception to the usual rule of non-representative litigation than a class action is. And this exception has the same potential as a class action to be "inefficient or unfair." *Amgen*, 133 S.Ct. at 1197.

Accordingly, the requirement that the plaintiffs be "similarly situated" to the other employees they seek to represent necessarily requires an analysis similar to that under Rule 23(b)(3). See *Espenscheid*, 705 F.3d at 772 (although there are "some terminological differences," the "case law has largely merged the standards" for certification of a state wage and hour claim under Rule 23(b)(3) and certification of a collective action under the FSLA). To obtain damages for other employees in addition to themselves, plaintiffs must be able to prove injury and damages for all with common evidence, or, if some individualized inquiry is needed, to resolve the individual issues fairly and accurately, without altering any party's rights under the FLSA or the Constitution.[3] Only then can a collective action

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[3] At the outset of a collective action, conditional certification simply authorizes plaintiffs to provide notice of the action. *See Genesis Healthcare Corp.* v. *Symczyk*, 133 S.Ct. 1523, 1530 (2013). After other employees have opted into the action and discovery is complete, courts frequently reconsider whether the claims of all of the employees are in fact "similarly situated." In making that determination, many courts consider factors such as (1) whether there are "'disparate factual and employment settings'" among the individual plaintiffs; (2) whether there are "'defenses available to [the] defendant [that] appear to be individual to each plaintiff'"; and (3) "'fairness and procedural considerations.'" *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d

provide employees with the "the advantage of lower individual costs to vindicate rights by the pooling of resources," and the judicial system with the benefit of an "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity," as Congress intended. *Hoffman-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 170 (1989).

3. In this case, the district court certified a Rule 23(b)(3) class (for litigation of the Iowa state law claims) and a collective action (for litigation of the FLSA claims), and both were tried together. See *supra* pp. 8–9. The jury was instructed that "the elements of the Iowa claim," and "what the plaintiffs must prove, are the same as the federal claim," but "the Iowa claim applies to a larger number of employees and a shorter period of time than the federal claim." J.A.479. Because the jury returned a single lump sum verdict, J.A.488, the judgment cannot stand if certification of either the Rule 23 class or the FLSA collective action was improper. As explained below, both were.

B. The Lower Courts Failed To Conduct A Rigorous Certification Analysis In This Case.

The district court certified the class and conditionally certified the collective action because it thought the "gang time compensation system" was the "'tie that binds' most all putative plaintiffs." Pet.App. 87a. The question whether that compensation system "violates the law" was thus a common question that, in the court's view, predominated over individual questions that "may

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1095, 1103 (10th Cir. 2001); *see also, e.g.*, Pet.App. 6a–7a; 7B Wright & Miller, *Federal Practice and Procedure* §1807, at 497–98 (3d ed. 2005).

exist" due to differences in the personal protective equipment worn by individual class members. *Id.* at 98a, 99a, 109a. But the court made that determination without analyzing the requirements of the law that allegedly was violated. When analyzed under the requirements of the FLSA, it is evident that the answer to the question whether the gang-time compensation system "violated the law" is *not* the same for all class members, and instead varies with the individual circumstances of each class member.

1. District courts must rigorously analyze the elements of plaintiffs' claim before certifying a class action or a collective action.

With certain exceptions not relevant here, the FLSA prohibits an employer from employing an employee "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. §207(a)(1). Whether the gang-time compensation system resulted in a failure to pay overtime compensation thus depends on (1) whether the various donning/doffing-related activities are "work" that must be included in the computation of the employee's "workweek;" (2) if so, whether the amount of time the employee spent on those activities, when combined with the amount of time the employee spent on other "work," resulted in a "workweek" longer than 40 hours; and, if so, (3) whether Tyson paid the employee for that overtime at a rate of at least one and one-half times the employee's regular rate of pay.

The first of these questions, even if capable of common proof, is not, by itself, dispositive of the

question whether any employee was wrongly denied overtime compensation. To make that determination, it is necessary to decide: how much time the employee spent on those activities; whether the addition of that time to the employee's workweek resulted in the performance of overtime work; and whether Tyson's system for compensating for these activities failed to compensate the employee for all of the overtime he or she worked. See *Mt. Clemens*, 328 U.S. at 688 (the employee has the burden of proving "that he has performed work and has not been paid in accordance with the statute").

Thus, while individual variations in the personal protective equipment that a particular employee wore, and the amount of time it took to don and doff that equipment, have no bearing on whether that donning and doffing is "work," these variations bear directly on the other elements necessary to establish a claim for liability and damages under the FLSA.

2. The lower courts failed to recognize the significance of the widespread variations in the individual circumstances of class members.

The type of personal protective equipment each plaintiff wore, and the amount of time required to don, doff and wash it, were directly relevant to each plaintiff's ability to prove that donning and doffing activities resulted in (1) overtime work (2) for which Tyson failed to compensate them. The evidence demonstrated that there were widespread variations in the amount of time employees spent on these activities. The lower courts erred in failing to recognize the import of this "'fatal dissimilarity,'" *Amgen*, 133 S.Ct. at 1197, in the predominance determination under Rule 23(b)(3) and the "similarly situated" determination under the FLSA.

The district court itself acknowledged that there were "numerous factual differences regarding the clothing and equipment employees wear." Pet.App. 99a. Although there is a "general need for employees to wear PPE for their work, exactly what kind of PPE is required differs greatly among employees." *Id.* at 86a. The "'clothing and equipment that team members wear differs from department to department and position to position.'" *Id.* at 86a–87a. Even class members employed in the same position wear different equipment because certain equipment is optional, and some individuals choose to wear it while others do not. See J.A.196–204, 206–207 (discussing examples of employees choosing to wear different optional equipment); see also *supra* pp. 5–6.

Plaintiffs' own evidence shows that there was substantial variance in the amount of time individual class members spent in donning, doffing, and cleaning protective equipment each day. The three class members who provided "representative" testimony at trial provide a vivid illustration. Each testified that he wore different items and spent different amounts of time on donning/doffing-related activities. See J.A.317–319 (more than two minutes for Brown to don equipment pre-shift); J.A.266–267 (six to seven minutes for Lovan); J.A.287–288 (ten to 12 minutes for Balderas).

Mericle likewise conceded that, in his time study, there were "different [times] for every single person [his] team measured." J.A.387. Indeed, the time study revealed wide variations in the amount of time employees spent donning and doffing different combinations of equipment. On the Processing floor, for example, employees spent between 0.583 minutes and 10.333 minutes donning equipment in the locker room pre-shift, and between 1.783 minutes and 9.267

minutes doffing and storing equipment post-shift. See J.A.142. On the Slaughter floor, employees spent between 2.1 and 13.28 minutes donning equipment in the locker room pre-shift, and between 1.967 and 5.517 minutes doffing and storing equipment post-shift. See J.A.143.

But even this understates the individual variations. Class members who wear "hard equipment," like "belly guards, knives, scabbard," have to rinse that equipment off in a wash area in the department at the end of their shift. J.A.222 (Hacker); J.A.262 (Lovan); J.A.288–289 (Balderas). Other class members, who wear items that can be laundered, such as the frock, gloves, rubber apron, and Kevlar sleeves, are not required to do any washing. They simply place these items in a laundry bag at the end of the shift, and the plant launders them. J.A.226–227 (Hacker).

Additional variation stems from the fact some class members are paid to come in before or after gang time to set up or clean up the production line. When they do so, they may don and doff their personal protective equipment during the set-up or clean-up time for which they are paid. See *supra* p. 7. And the record shows that some class members had time to don some protective gear at their work station after the production line had commenced operation—and thus were paid for that activity under Tyson's gang-time system. J.A.366–369. Mericle acknowledged that he witnessed that during his time study. J.A.369.

These factual differences raised a host of individualized issues that clearly predominated over any common legal questions about whether the donning and doffing of certain personal protective equipment is "work" that should be counted in the calculation of the employees' "workweek." Cf.

Haliburton Co. v. *Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2416 (2014) (if each class member in a large securities fraud action "would have to prove reliance individually, ... common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)"); *Comcast*, 133 S.Ct. at 1433 (without a common way to prove damages for all class members in a large antitrust class action, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"). The existence of these individual issues should have precluded class certification and conditional certification or at least led the district court to decertify the class before, if not immediately after, the trial.

The lower courts, however, brushed aside these differences. In the initial class certification decision, the district court acknowledged that "[i]ndividual questions may exist," but stated, without any detailed analysis, that it did "not believe they predominate." Pet.App. 109a. Even when it became clear that plaintiffs were going to paper over these differences and "prove" classwide liability and damages by extrapolating the average times from Mericle's study to each class member regardless of individual circumstances, the district court refused to decertify the class because the "case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility." *Id.* at 37a. Similarly, the Eighth Circuit conceded that "individual plaintiffs varied in their donning and doffing routines," but it believed that their suit was "not 'dominated by individual issues'" because they all "worked at the same plant and used similar equipment." *Id.* at 8a.

This reasoning falls far short of the demanding analysis required by this Court and Rule 23 in a predominance inquiry. Nor does it satisfy the comparable requirements for certification of a collective action under the FLSA. In light of the requirements of the FLSA, the time variations at issue in this case are not mere "rounding errors." To the contrary, they are outcome determinative because they control whether or not a particular plaintiff worked any unpaid overtime at all. The lower courts thus plainly erred in concluding that a class action and collective action could be certified.

C. The Courts Below Impermissibly Allowed Plaintiffs To "Prove" Injury And Damages By Using Averages That Masked Individualized Issues.

The lower courts compounded their failure to conduct a rigorous predominance inquiry by permitting plaintiffs to "prove" liability and damages for all class members using "average" times. This use of statistics improperly disguised the presence of numerous individualized issues. It also violated the Rules Enabling Act and Tyson's due process rights.

1. Plaintiffs' statistical evidence masked individual differences and thus did not "prove," but simply presumed, injury and damages.

Plaintiffs argued below, and the lower courts agreed, that the different amounts of time individual workers spent donning and doffing personal protective equipment did not foreclose class treatment, because plaintiffs could prove their case using the averages derived from Mericle's study. These averages, however, were not "common" evidence justifying class certification because they

were not probative of any individual plaintiff's actual injury or damages. Instead, they were "proof" only of the injury and damages suffered by a non-existent hypothetical plaintiff.

A few examples from the trial illustrate the point. One class member, Mr. Brown, testified that it took him just over two minutes to don his equipment. J.A.318–319. But plaintiffs asked the jury to determine liability and to award damages based on the assumption that Brown (and every other class member who worked on the Slaughter floor) spent 6.4 minutes donning equipment in the locker before the start of the shift, which was the average time observed in Mericle's study, J.A.123–124. Brown thus did not suffer the injury and damages that plaintiffs purportedly established using Mericle's averages.

Similarly, other class members, like FLSA opt-in plaintiff Leticia Montes, who worked on the Slaughter floor, did not use a knife and had *none* of the knife-related safety equipment that knife-wielding employees must don, doff, and rinse. J.A.167. Thus her donning and doffing time would be less than that of knife-wielding employees who donned, doffed and rinsed additional items. See, e.g., J.A.225–226, 118 (discussing the knife-related equipment that must be rinsed). Yet plaintiffs asked the jury to determine liability and award damages on the assumption that Montes spent the same 8.46 minutes donning equipment and 5.9 minutes doffing and washing knife-related equipment at the end of the shift that they used for class members who worked on the Slaughter floor and used a knife. J.A.123–124.

As other lower courts have recognized, the fact that it was necessary for plaintiffs to use averaging to prove their case should have been a "caution signal"

that class certification was improper. *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing class certification and classwide judgment obtained with testimony of expert whose damages calculations were based "on abstract analysis of 'averages'"). It is improper to permit a class action to proceed when the supposedly "common" or "representative" evidence is a hypothetical "average" or composite plaintiff derived from a sample. Averages "are not probative of any individual's claims"; individual class members may be "well above or below the average." *Gates* v. *Rohm & Haas Co.*, 655 F.3d 255, 261, 266 (3d Cir. 2011) (denying class certification of tort claims arising from exposure to alleged carcinogen where plaintiffs' "common" proof was expert testimony based on "an average exposure, not the exposure of any actual class member"). That was plainly true here: plaintiffs' averages were used to mask differences among class members that are essential to determining whether they were denied overtime compensation and, if so, the amount of their damages.[4]

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[4] Mericle's averaging can manufacture injury as well as affect damages. Mericle's averaging increases "work" time for individuals who actually spent less time donning, doffing, and rinsing equipment than the average observed in Mericle's time study. Even modest increases in time can be dispositive as to liability. As Fox's mathematical calculations showed, *see supra* p. 14, a decrease of just a few minutes of time spent on donning/doffing-related activities resulted in 110 additional class members with no injury as well as a reduction of approximately $1.8 million in damages for the Rule 23 class.

2. Use of statistical averages in this case violated the Rules Enabling Act and the Due Process Clause.

Use of Mericle's averaged times not only masked important differences that should have precluded certification, but also impermissibly lessened plaintiffs' burden of proof and undermined Tyson's ability to defend itself. This violated Tyson's due process rights, see *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (due process ensures "'an opportunity to present every available defense'") (quoting *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)), and the Rules Enabling Act, which requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b). See also *Wal-Mart*, 131 S.Ct. at 2561 (class certification cannot result in the alteration of the substantive rights of defendants or class members).

No court would allow an individual employee to meet his "burden of proving that *he* performed work for which he was not properly compensated," *Mount Clemens*, 328 U.S. at 687 (emphasis added), by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform.[5] Yet that is exactly what happened here. Plaintiffs obtained an

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[5] *See, e.g.*, *Grochowski* v. *Phx. Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (employee's testimony that a co-worker generally worked with him, but did not always do so, insufficient to show that the co-worker worked unpaid overtime); *Callahan* v. *City of Chi.*, 2015 WL 394021, at *31 (N.D. Ill. Jan. 23, 2015) (studies showing that "'many'" taxi cab drivers earn less than minimum wage "cannot save Callahan's claims. Whether drivers other than Callahan earn or have earned the minimum wage ... is irrelevant to whether Callahan herself earned that minimum"), *appeal docketed*, No. 15-1318 (7th Cir. Feb. 19, 2015).

aggregate classwide damages award by applying Mericle's average times to all class members without producing evidence that all class members actually worked overtime for which they were not compensated.

This lessening of plaintiffs' burden of proof also violated Tyson's right to due process. In individual trials, Tyson could respond to a plaintiff's claim for unpaid donning and doffing time by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore. Or Tyson could show that the plaintiff was compensated for time spent donning and doffing apart from any K-Code time, because the particular plaintiff donned equipment after "gang time" started or when the plaintiff was paid to setup or clean up the production area. See *supra* p. 7; see also J.A.90 (discussing example of an employee who did all of his post-shift washing of equipment on paid clean-up time). Indeed, one plaintiff, Mr. Balderas, testified on direct examination that it takes 30 seconds to don his hard hat, but on cross-examination conceded that he could actually do it in 2–3 seconds. J.A.297; see also J.A.266–270 (Mr. Lovan admitting on cross-examination that he can don his equipment in about two minutes less than he testified to on direct).

In this class action, however, Tyson could not raise such individualized defenses. It is not feasible to call hundreds or thousands of class members at trial, and doing so would be inconsistent with the reason the court certified the class. A defendant is not even permitted to "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23's

representative approach to litigation." 3 William B. Rubenstein, *Newberg on Class Actions* §9:16 (5th ed. 2015). As a consequence, Tyson was forced to defend against a hypothetical or composite plaintiff derived from Mericle's averages. Rather than challenging whether individual class members suffered any injury or damages, Tyson could only attack plaintiffs' supposedly "representative" evidence as biased, unreliable, and not actually representative of anyone in the class. See, e.g., J.A.376–391.

Substituting the right to challenge an expert's study for the right to raise individualized defenses plainly "abridge[d]" and "modif[ied] [Tyson's] substantive right[s]," in violation of the Rules Enabling Act, 28 U.S.C. §2072(b). This is why several lower courts have properly recognized that class certification based on such averaging results in an impermissible "alteration of substantive" rights. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990). It creates "the requisite commonality for trial" only by "submerge[ing]" the "discrete components of the class members' claims and the [defendant's] defenses." *Id.* It likely results in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). And it poses the "'danger of overcompensation'" in that some members of the class may benefit from the recovery even though they were not injured. *Id.* at 232; *id.* at 231 ("This kind of disconnect offends the Rules Enabling Act.").

Wal-Mart likewise makes clear that determining a defendant's liability to a class by extrapolation from the average of a sample is a flawed approach that cannot be used to avoid individual inquiries and

thereby allow thousands of different claims to be aggregated in a single class action. In *Wal-Mart*, this Court reversed class certification where liability and damages would be determined for a sample of class members, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized proceedings." 131 S.Ct. at 2561. Such a "Trial by Formula," this Court unanimously held, would impermissibly abridge the defendant's rights under the Due Process Clause and the Rules Enabling Act. *Id.*

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet.App. 10a; see also *id.* at 13a. That is a distinction without a difference. Although plaintiffs' expert added the average donning/doffing times to the class members' actual time records, the average times were essential to plaintiffs' effort to prove whether any individual class member worked more than 40 hours without receiving overtime compensation and, if so, the amount of damages. Thus here, as in *Wal-Mart*, classwide liability was ultimately based purely on extrapolation and the erroneous assumption that each class member spent the same "average" amount of time donning, doffing, washing, and walking. And here, as in *Wal-Mart*, there was no individualized inquiry into whether individual class members were actually injured and,

if so, the amount of damages to which they were entitled.

D. *Anderson* v. *Mt. Clemens Pottery Co.* Does Not Justify Use Of "Averages" To Mask Differences Among Individual Employees That Are Material To Damages Claims Under The Fair Labor Standards Act.

Ultimately, the panel majority below upheld plaintiffs' use of averages on the theory that drawing "inference[s]" from such evidence was "allowable" under this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.* Pet.App. 8a. That is incorrect.

Mt. Clemens was a collective action brought by seven employees and their local union alleging that employees were deprived of proper overtime compensation. 328 U.S. at 684. Pottery employees were allowed to "punch in" up to 14 minutes before, and were required to "punch out" within 14 minutes after, the "established working periods," but were paid for only the established working period. *Id.* at 683–84. Plaintiffs claimed that "all the time between the hours punched on the time cards constituted compensable working time." *Id.* at 684.

This Court disagreed in part. The Court found that the "employees did not prove that they were engaged in work from the moment when they punched in at the time clocks to the moment when they punched out." *Id.* at 689. It held, however, that certain "preliminary activities" and the time necessarily spent walking from the time clock to the work bench were compensable work.[6] *Id.* at 692.

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[6] Congress overruled this aspect of *Mt. Clemens* with the enactment of the Portal-to-Portal Act of 1947. *See IPB, Inc.* v.

This Court therefore reversed the court of appeals, which had denied damages for the preliminary activities because it thought plaintiffs had failed to prove "by evidence rather than conjecture the extent of overtime worked." *Id.* at 686. The Court deemed this an "improper standard of proof." *Id.* Instead, an employee "has the burden of proving that he performed work for which he was not properly compensated." *Id.* at 686–87. But if he makes that showing, an "employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687–88.

The rule "that precludes the recovery of uncertain and speculative damages" applies "only to situations where the fact of damage is itself uncertain." *Id.* at 688. In *Mt. Clemens*, however, the Court was "assuming that the employee has *proved* that he has performed work and *has not been paid in accordance with the statute*," so the "damage is therefore certain," and the "*uncertainty lies only in the amount of damages*." *Id.* (emphases added). The Court therefore remanded "for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages." *Id.* at 694.

Alvarez, 546 U.S. 21, 26–28 (2005) (discussing amendments codified at 29 U.S.C. §254(a)).

Nothing in that decision allows an employee to prove that she was not properly compensated based on the amount of time that a *different employee*—much less a fictional "average" employee—spent performing *different activities* that admittedly took *different amounts of time* to perform. Nowhere did the Court suggest that the district court on remand should calculate the average time spent on *all* of the different preliminary activities performed by the employees who testified in *Anderson* and use that average time to calculate damages for every plaintiff, regardless of whether that average was a reasonable approximation of the amount of the plaintiff's unpaid overtime.

On the contrary, it explained that a method may "be used as an appropriate measure of the hours worked" only if it "*accurately reflect*[*s*] the period worked." *Id.* at 690 (emphasis added) (rejecting use of time clock records because the evidence showed that they were not an accurate reflection of "the actual time worked by employees"). For the reasons discussed above, Mericle's averages do not "accurately reflect" the amount of time that class members actually spent donning, doffing, and, in some cases, cleaning their different equipment. Instead, it is a calculation of the average time spent by an unrepresentative sample of employees who worked a variety of different jobs and had different combinations of equipment that took varying amounts of time to don, doff, and clean. Accordingly, no reasonable inference may be drawn from those averages.

As the Seventh Circuit explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, extrapolation from a sample is an accurate measure of other class member's unpaid overtime only if everyone in the

class has the same duties that take essentially the same amount of time to perform—which, as Mericle's time study and the testimony of plaintiffs' own witnesses show, is decidedly *not* the case here. *Id.* at 775. Plaintiffs in *Espenscheid* were technicians who claimed they were required "to do work for which they were not compensated at all, and also to work more than 40 hours a week without being paid overtime for the additional hours" in violation of the FLSA and parallel provisions of state law. *Id.* at 773. The Seventh Circuit assumed that "plaintiffs could prove that [the employer's] policies violated the [law]." *Id.* But even so, the court held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776.

In so holding, the Seventh Circuit expressly rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class." *Id.* at 774. There, as in this case, no random sampling had been performed. *Id.*[7] But even if by "pure happenstance" the number of unpaid hours worked each week by the employees in the sample "was equal to the average number of hours of the entire class," the sampling "would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held

> would require that all 2341 have done roughly the same amount of work.... No one thinks there

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[7] As explained above, *supra* at pp. 12–13, Mericle admitted that his study was not a "random sample." J.A.359.

> was such uniformity. And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) under-compensate him by half.

Id.

The same lack of uniformity and corresponding risks of windfall payments exist here. Nothing in *Mt. Clemens* justifies such a result. Nor does that decision excuse the violations of the Rules Enabling Act and Tyson's due process rights. The decision below should therefore be reversed.

II. CLASS CERTIFICATION IS IMPROPER UNLESS PLAINTIFFS EITHER PROVE THAT ALL CLASS MEMBERS WERE INJURED OR ENSURE THAT UNINJURED CLASS MEMBERS DO NOT CONTRIBUTE TO THE DEFENDANT'S LIABILITY OR SHARE IN ANY CLASS RECOVERY.

The decision below should be reversed for a second reason. The Eighth Circuit majority upheld certification of a class and collective action that included hundreds of uninjured plaintiffs and would allow such individuals to collect damages. In doing so, it exceeded its authority.

A. Federal Courts Have No Authority To Provide Compensation To Persons Who Cannot Establish A Cognizable Injury.

It is axiomatic that federal courts cannot order money to be paid to an uninjured plaintiff. Article III

limits the authority of federal courts to providing redress for actual injuries that are fairly traceable to a defendant. *Lujan*, 504 U.S. at 560; see also *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996) (judiciary's role is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). These requirements ensure that courts do not "undertak[e] tasks assigned to the political branches," *id.* at 349, which possess the authority (subject to certain limits) to redistribute wealth to promote the general welfare.

The FLSA likewise assigns to the courts the role of providing redress for specific injuries by creating a cause of action for employees to recover "unpaid overtime compensation" from their employer. 29 U.S.C. §216(b). Thus, the statute requires that an employee establish that he suffered an injury (or, in the words of *Mt. Clemens*, "that damage is therefore certain," 328 U.S. at 688) in order to invoke the power of the federal courts. See *supra* pp. 29–30, 41–43.

The class action and collective action devices do not—and cannot—expand the limited role of the courts. Rather,

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Shady Grove Orthopedic Assocs. v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality); see also *Lewis*, 518 U.S. at 357–58 & 360 n.7 ("Courts have no power to presume and remediate harm that has not been

established," and "[t]his is no less true with respect to class actions than with respect to other suits.").

It follows from the foregoing straightforward and indisputable propositions that the class action and collective action devices do not authorize courts to award damages to individuals who cannot establish a cognizable injury. Yet many lower courts have allowed named plaintiffs to sue on behalf of a class that includes uninjured members. Some have observed that, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009); see also *Krell* v. *Prudential Ins. Co. of Am.* (*In re Prudential Ins. Co. of Am.*), 148 F.3d 283, 307 (3d Cir. 1998) (if named plaintiffs can show they are injured and have standing, "absentee class members are not required to make a similar showing"). These courts have thus interpreted Rule 23 as not requiring proof that all class members suffered "harm or threat of immediate harm," *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010), and have even affirmed class certification and judgment for the class when it was clear that some class members "avoid[ed] injury altogether," *In re Urethane Antitrust Litig*, 768 F.3d 1245, 1254 (10th Cir. 2014), *petition for cert. filed sub nom.* No. 14–1091 (Mar. 9, 2015).

But the fact that a single, named class plaintiff has Article III standing—and that a court can therefore adjudicate a case or controversy between that plaintiff and the defendant—does not establish that the court has authority to award damages to class members who cannot prove injury. Nor do practical necessities justify such an assertion of authority. In essence, a number of lower courts have acted on the

theory that (1) when a defendant's actions affect a large number of individuals, class litigation is the appropriate way to determine the legality of those actions and provide redress for them; (2) it is unrealistic and unfair to expect courts to determine, at the class certification stage, whether a class seeking such redress includes uninjured class members; and (3) it is therefore appropriate to certify a class as long as it does not contain a "great many" uninjured persons. *Kohen*, 571 F.3d at 677; see also, *e.g.*, *Mims* v. *Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (following *Kohen*). These purported justifications suffer from a number of flaws.

First, there is no presumption in favor of class actions whenever a defendant's actions affect a large group of people. The framers of the 1966 amendment that added Rule 23(b)(3) noted that it applied in situations where "class-action treatment is not as clearly called for," and that class treatment "may *or may not*" be appropriate, depending on the nature of the issues, including liability defenses. Fed. R. Civ. P. 23 advisory committee's 1966 note (subd. (b)(3)) (emphasis added). Ultimately, the framers stated that the device should be used only where it can "achieve economies of time, effort, and expense, and promote uniformity of decision ... *without sacrificing procedural fairness or bringing about other undesirable results.*" *Id.* (emphasis added); see also *Wal-Mart*, 131 S.Ct. at 2561 (class cannot be certified on the premise that the defendant "will not be entitled to litigate its statutory defenses to individual claims").

Second, and more fundamentally, requiring defendants to pay damages to persons who cannot establish injury is not merely unfair and

"undesirable," it is beyond the authority of federal courts. Thus, even if there were a principled and administrable standard for determining what number of uninjured plaintiffs is not a "great many," *Kohen*, 571 F.3d at 677—and no such standard exists[8]—courts cannot use such concepts to expand their authority. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23's "'requirements must be interpreted in keeping with Article III constraints.'") (quoting *Amchem*, 521 U.S. at 612–13). Indeed, the theory that courts can use the class action device to award damages to uninjured persons as long as there are not a "great many" of them, is no different in kind than the now-discredited theory of "fluid class" recoveries, in which courts estimated damages in gross and allowed "unclaimed" amounts to be apportioned to *future* purchasers. See *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1974), *vacated*, 417 U.S. 156 (1974).

Accordingly, as the D.C. Circuit has correctly held, the predominance requirement of Rule 23(b)(3) "demands more than common evidence" that defendants violated some law. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). It also requires that plaintiffs can prove, "through common evidence, that *all* class members

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[8] There is no neutral and consistent way for a court to decide what is a "great many." What may sound like a small number in one context (just 2.4% of the class) could be a large number of people. *Compare Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 826 (7th Cir. 2012) (affirming class certification where 2.4 percent of the class might not be injured because that "is certainly not significant enough to justify denial of certification"), *with In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (Kayatta, J., dissenting) (noting that if 2.4% of the class were uninjured, that "is likely to be at least 24,000 people" and "nobody knows who the 24,000 are").

were in fact injured" by that alleged violation. *Id.* (emphasis added). "Otherwise, individual trials are necessary" to determine whether a particular class member was injured and is entitled to any relief from the court. *Id.*

B. A Class Or Collective Action Should Be Certified Only Where There Is Evidence Of Classwide Injury Or A Mechanism That Ensures That Uninjured Members Will Not Contribute To, Or Share In, Any Damages Award.

The fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured. But where class plaintiffs cannot offer such proof, they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages. Moreover, as the First Circuit recently recognized, the mechanism for culling uninjured class members must be "'administratively feasible,'" and "protective of defendants' Seventh Amendment and due process rights." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

Although the First Circuit properly recognized the need to cull uninjured class members, the mechanism it approved is seriously flawed and does not provide adequate protections against the dangers the court identified. The errors in *In re Nexium* thus highlight the need for this Court to require that lower courts undertake a rigorous analysis of any supposedly fail-safe mechanism. Otherwise, certification in the absence of evidence that all class members were

actually injured will inevitably (and impermissibly) allow courts to exceed their constitutional power to remedy injuries.

The first error is that *In re Nexium affirmed* class certification even though the district court had *not* identified any mechanism for culling uninjured class members, because the First Circuit thought such a mechanism *could* be identified, and defendants had not proven otherwise. *Id.* at 21, 32. That is the wrong standard. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart*, 131 S.Ct. at 2551; see also *Comcast*, 133 S.Ct. at 1432. It is therefore *plaintiffs'* burden to show that there is an administratively feasible and constitutionally valid way for culling the uninjured class members. *In re Nexium*, 777 F.3d at 36 (Kayatta, J., dissenting). As with all requirements of Rule 23, plaintiffs must make that showing *before* the class is certified, and they continue to bear the burden through the class trial and judgment. See *supra* p. 26 (discussing duty of court to decertify class if requirements of Rule 23 are not met at any time before entry of final judgment).

The second error is that the method for culling uninjured class members proposed by the First Circuit—having each class member sign an affidavit swearing that he or she was injured—is not administratively feasible and will not protect defendants' constitutional rights. What will the court do if thousands of class members file affidavits? "How exactly will defendants exercise their acknowledged right to 'challenge individual damage claims at trial?'" *In re Nexium*, 777 F.3d at 35 (Kayatta, J., dissenting). Will defendants be denied the opportunity to depose these class members or take

other discovery? See Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order," parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense"); *id.* 56(d) (when nonmovant "cannot present facts essential to justify its opposition" to a motion for summary judgment, the court may deny the motion or delay consideration to allow time for discovery).

A court cannot certify a class (or collective) action with uninjured class members when the proposed culling mechanism poses these types of unanswered questions. If there is no accurate and fair way to cull uninjured class members, it cannot truly be said that the common questions of law or fact predominate over the individual questions of which class members were injured. Thus, any mechanism to cull uninjured class members must be given the same "rigorous analysis" that is applied to other methods by which plaintiffs seek to establish that common issues predominate over individual issues. See *Comcast* 133 S.Ct. at 1432–33. Just as a court must deny class certification where plaintiffs' proposed damages models employ flawed methodologies or produce "arbitrary" measurements, *id.* at 1433, so, too, must it deny class certification when their proposed mechanism for culling uninjured class members is arbitrary, unfair, or unworkable in practice. To ignore those defects and allow class certification simply because plaintiffs or the court can identify *some* mechanism, "no matter how arbitrary" or unfair it may be, would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

C. The Judgment Entered In This Case Violates The Foregoing Requirements.

The class action and collective action certifications and judgment in this case cannot stand because

neither plaintiffs nor the district court made any effort to cull out the uninjured class members so that they do not share in the judgment. Plaintiffs' damages expert candidly admitted that the class contains at least 212 employees who were not injured because they did not work *any* unpaid overtime even if it is erroneously assumed that they worked the inflated average time in Mericle's flawed study. See *supra* p. 14–15. The jury verdict establishes that the actual number of uninjured class members is even larger.

As Judge Beam explained in dissent below, the fact that the jury awarded plaintiffs less than half the damages they requested indicates that the jury disagreed with plaintiffs' "over-generous time study conclusions." Pet.App. 125a. And plaintiffs' expert admitted that if "'employee[s] worked less than [the time study] numbers ... it is possible that Tyson's K-code payments already have fully paid them for that time.'" *Id.* at 123a (Beam, J., dissenting) (omission in original). Accordingly, under plaintiff's own evidence, hundreds of class members "have no damages." *Id.* at 125a. Yet *all* class members are "included as beneficiaries of the single damages verdict" and, "damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 22a–24a (Beam, J., dissenting).

Neither the panel majority below nor plaintiffs have explained how that result is consistent with the FLSA, due process, the Rules Enabling Act, or Article III. The majority's only justification for including uninjured people in the class and judgment was to say that *Tyson* "invited" the error by requesting that the jury be instructed that it could not award damages for "[a]ny employee who has already received full compensation for all activities you find

to be compensable." Pet.App. 10a (quotations omitted). As explained in Tyson's petition for certiorari, Pet. 29–30, that reasoning is flawed and cannot insulate the district court's error from appellate review. Tyson did not invite the erroneous inclusion of uninjured class members; it "vigorously" opposed class certification "at every turn in this litigation." Pet.App. 20a (Beam, J., dissenting). But when its objections to class certification were rejected by the district court, Tyson reasonably and properly requested "that the plaintiffs be held to their evidentiary burdens of proof." *Id.* In all events, courts cannot rely on "invited error" as a basis for exceeding the constitutional limits of their authority to provide compensation.

Plaintiffs vaguely asserted that there is "no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members." Opp. 19. But the only authority they cite is the same jury instruction cited by the court of appeals. The judgment, however, does not say uninjured class members will not share in the recovery; it says nothing about how the award will be distributed. Pet.App. 125a–126a (Beam, J., dissenting). Nor, tellingly, have Plaintiffs proposed any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured. There is just "a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 24a (Beam, J., dissenting). Any attempt by the district court now to reopen the judgment and reallocate the damages would raise a host of due process concerns and violate the Seventh Amendment's command that "no fact tried by a jury,

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." See *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 497 (1931) (At common law there was "no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all."); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (Seventh Amendment confers a right "to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact," either "a judge" or "another jury").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage-and-hour violations arising out of an employer's failure properly to compensate employees for time spent donning and doffing protective equipment and walking between sites where work was performed, the district court abused its discretion in granting certification where plaintiffs proceeded to prove the amount of work they did using individual timesheet evidence and representative proof concerning donning, doffing, and walking times in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a class or collective action may be certified when it contains members who may not have been injured.

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INTRODUCTION

Federal and state wage-and-hour laws require employers to keep accurate records of employees' actual work-hours and pay time-and-a-half for overtime work. For decades, petitioner Tyson Foods has resisted compliance with both requirements. This case involves one Tyson plant at which plant-wide policies deprived workers of overtime compensation for donning and doffing protective and sanitation gear necessary for their jobs, walking between the locker room and the production floor, and related activities. Tyson did not keep records of its employees' hours worked, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), Iowa wage-and-hour law, and a 1996 federal court injunction requiring records of these activities to be kept at the specific plant at issue.

Had Tyson kept the records, the class-certification question in this case would be easy. Four of five issues tried to the jury were common: (1) whether the activities were "work," (2) whether they were exempt under the Portal-to-Portal Act of 1947, (3) whether they were compensable when performed during the workers' meal break, and (4) whether they were de minimis. Respondents answered those four questions using proof common to the class. Within each of the two departments at issue, all employees used the same sanitation gear and standard protective gear and walked to and from the same production line on unpaid time as a matter of company policy. For the fifth issue (the amount of time worked), adding up workers' time would have been simple arithmetic had records existed. But because Tyson violated the law, respondents

employed inferential proof, including the time study central to Tyson's objection to certification.

This Court addressed that scenario in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that an employer cannot hide behind its own recordkeeping violations to defeat enforcement of overtime requirements by arguing plaintiffs have not proved the precise amount of time worked. When an employer fails to keep required records, employees may prove their case by inference. That evidentiary standard avoids rewarding lawbreakers like Tyson.

Under this Court's decisions, Rule 23 predominance must be assessed in light of the substantive law governing plaintiffs' claims. Given *Mt. Clemens*, the four common compensability issues predominated because the issue of how much time each worker worked could be shown by classwide, inferential proof. Respondents' reliance on such evidence—including a time study similar to one Tyson itself used to determine compensation for employees—comports with Rule 23's requirements.

On the second question—whether the presence of class members without damages defeats certification—Tyson now concedes a class may be certified although some members ultimately cannot prove injury. Tyson argues a court may not award damages to class members not entitled to them. That truism is inapplicable here: the district court did not award damages to uninjured individuals.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Congress recognized that national action was required to combat sweatshop conditions, and accordingly enacted the FLSA "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). To accomplish these objectives, the FLSA established federal minimum-wage and maximum-hour standards, *see* 29 U.S.C. §§ 206, 207, and requires overtime compensation for hours in excess of 40 in a workweek "at a rate not less than one and one-half times the [employee's] regular rate," *id.* § 207(a)(1).

The FLSA requires employers to keep accurate, detailed records of the hours worked by each employee. *See id.* § 211(c) ("[e]very employer shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him" as prescribed by the Secretary of Labor). Neither averaging nor estimating time worked satisfies an employer's statutory obligation. *See, e.g., Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984); T. Michael Kerr, Adm'r, Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, Fair Labor Standards Act, 2001 WL 58864, at *2 (Jan. 15, 2001).

Congress enacted this recordkeeping requirement "to aid in the enforcement of the Act." *Nat'l League*

of Cities v. Usery, 426 U.S. 833, 836 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). "The obligation [to pay wages under the FLSA] is the employer's and it is absolute The employer at its peril had to keep track of the amount of overtime worked by those of its employees in fact within the [FLSA]." *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959) (Friendly, J.) (internal quotations and alteration omitted).

Accordingly, in *Mt. Clemens*, this Court held that, when employers violate their statutory recordkeeping duty, employees are relieved of the burden to prove precisely how many hours they worked. Rather, the employee need only "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. Such inferential proof shifts the burden to the employer to prove the "precise amount of work performed" or "to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88.

2. Cases such as this one for failure to pay overtime for time spent donning and doffing gear before and after work and during meal breaks and walking to and from the production line implicate four classwide issues under the FLSA.

First, the FLSA covers only "work," which includes any "exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (internal quotations omitted).

Second, in the Portal-to-Portal Act, Congress exempted from the FLSA's scope "walking to and from the actual place of performance of the [employee's] principal activity" and "activities which are preliminary to or postliminary to said principal activity." 29 U.S.C. § 254(a). However, that provision does not exempt "performance of the principal activity," which "embraces all activities which are an 'integral and indispensable part of the principal activities.'" *Alvarez*, 546 U.S. at 29-30 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956)). Donning and doffing protective clothing and equipment may be "integral and indispensable" and therefore compensable. *Id.* at 32; *Steiner*, 350 U.S. at 248-49.

Additionally, all work performed during a continuous workday is compensable notwithstanding the Portal-to-Portal Act, so "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [the Portal-to-Portal Act], and as a result is covered by the FLSA." *Alvarez*, 546 U.S. at 37.

Third, an employee's meal break is not compensable if the break is "bona fide" and not predominantly for the employer's benefit. *See Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 264 (5th Cir. 1998); *Roy v. County of Lexington*, 141 F.3d 533, 545-46 (4th Cir. 1998); *Henson v. Pulaski Cnty. Sheriff Dep't*, 6 F.3d 531, 533-34 (8th Cir. 1993).

Fourth, a "de minimis rule" excludes "negligible" time from "compensable working time" under the FLSA. *Mt. Clemens*, 328 U.S. at 692. This exception

applies only to amounts of time so small they are not "practically ascertainable." 29 C.F.R. § 785.47.

3. The FLSA imposes fines and imprisonment for certain violations of the FLSA's wage-and-hour provisions and its recordkeeping requirements. 29 U.S.C. § 216(a). It further creates a private cause of action for unpaid minimum wages or overtime and grants additional liquidated damages and attorneys' fees. *Id.* § 216(b). The FLSA authorizes employees to bring "collective" damages actions for themselves "and other employees similarly situated." *Id.* Unlike in a Rule 23 class action, a plaintiff must "opt in" to an FLSA collective action. *See id.*

Many States have complementary wage-and-hour laws paralleling the FLSA, including the Iowa Wage Payment Collection Law ("IWPCL"), Iowa Code § 91A.1 *et seq.* The IWPCL requires employers to pay for all time worked, *see Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 879 (N.D. Iowa 2007), and to pay overtime wages, *see Stahl v. Big Lots Stores, Inc.*, 2007 WL 3376707, at *4 (N.D. Iowa 2007). Like federal law, Iowa law requires recordkeeping, Iowa Admin. Code 875-216.2(1)(g), and creates a private cause of action, Iowa Code § 91A.8.

B. Factual Background

1. Petitioner Tyson Foods operates numerous meat-processing facilities, including the Storm Lake, Iowa facility at issue. Employees on Tyson's fast-moving production lines work in a physically demanding and dangerous work environment that requires wielding industrial slaughtering and butchering machinery in a high-pressure setting. The hours worked are long. Each shift exceeds eight

hours, and full-time employees typically work six days a week. JA122, 181-82, 326, 437.

For three decades, Tyson and IBP (Tyson's predecessor) repeatedly have been found liable for violating the FLSA, "reflecting what can only be described as a deeply-entrenched resistance to changing their compensation practices to comply with [its] requirements." *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 794 (M.D. Tenn. 2008).[1] Tyson's repeated violations stem from its longstanding "gang-time" compensation system, under which it paid employees only for time they are at work stations and the production line is moving. Tyson neither recorded nor paid employees for time spent on other necessary activities, including donning and doffing gear and walking between the production line and locker rooms.

In 1988, the Department of Labor ("DOL") charged that Tyson's gang-time system violated the FLSA's overtime and recordkeeping requirements. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1318 (D. Kan. 1993), *aff'd and remanded*, 38 F.3d 1123 (10th Cir. 1994). A district court found that IBP's "company-wide practice is not to record or compensate employees for the time involved in performing the pre-shift and post-shift activities

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[1] *See also, e.g., Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Jordan v. IBP, Inc.*, 2004 WL 5621927 (M.D. Tenn. 2004); *Chavez v. IBP, Inc.*, 2005 WL 6304840 (E.D. Wash. 2005); *Solis v. Tyson Foods, Inc.*, No. 2:02-CV-1174-VEH, Dkt. 523 (N.D. Ala. June 4, 2010); *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273 (D. Kan. 2012), *aff'd*, 770 F.3d 1300 (10th Cir. 2014); *Guyton v. Tyson Foods, Inc.*, No. 3:07-cv-00088-JAJ, Dkt. 257 (S.D. Iowa Apr. 3, 2012).

which [the court] determined to be compensable," including donning and doffing protective gear. *Reich v. IBP, Inc.*, 1996 WL 445072, at *1 (D. Kan. 1996), *aff'd*, 127 F.3d 959 (10th Cir. 1997). The court issued an injunction, which remains in effect and specifically names the Storm Lake facility, requiring Tyson to comply with the FLSA's overtime and recordkeeping requirements with respect to "pre-shift and post-shift activities found to be compensable under the [FLSA]." Injunction, *Reich v. IBP, Inc.*, No. 2:88-cv-02171, Dkt. 238 (D. Kan. July 30, 1996).

In 1998, after DOL again filed suit in response to IBP's continued refusal to comply with the *Reich* injunction, petitioner unilaterally instituted the "K-Code" policy at issue in this case. *See Acosta v. Tyson Foods, Inc.*, 2013 WL 7849473, at *10, *19 (D. Neb. 2013), *rev'd on other grounds*, 2015 WL 5023643 (8th Cir. 2015). Under this policy, Tyson still failed to record the actual time employees spent donning and doffing protective gear. Instead, Tyson estimated based on a 1998 time study the average time needed to perform some (but not all) donning and doffing activities, and allocated four minutes on each employee's timesheet to those activities. *Id.* at *14; *see* JA121-22; *see also infra* pp. 16-17 (describing Tyson's time study). As DOL later explained, the K-Code policy did not satisfy the FLSA, which requires an employer to "record and pay for each employee's *actual* hours of work." Opinion Letter, 2001 WL 58864, at *2 (rejecting "meatpacking companies[']" suggestion "to pay employees[] wages based on an average amount of time that all employees work").

2. Tyson requires workers to wear sanitation and protective gear that they must don in company locker rooms before reporting to the production line for their shifts. All workers must wear the same basic sanitation gear: rubber gloves, aprons, sleeves, cotton gloves, a hairnet, and a beardnet if needed. JA119, 150, 176-78, 233. All workers must also wear sanitation apparel that is uniform for each department: all Processing workers must wear a frock, and all Slaughter workers must wear light-colored shirts and pants ("whites"). *Id.* Tyson also requires all employees on the production lines to wear personal protective gear ("PPE"). All employees who work on the Slaughter and Processing floors at the Storm Lake facility must wear the same "standard" PPE: a hard hat, earplugs or ear muffs, and boots. JA119, 249-50. There are thus no variations in the sanitation gear for employees in the same department, and no variations among respondents' standard PPE throughout the plant.

Tyson further requires respondents to wear "knife-safety" PPE. Knife-safety PPE is also largely uniform; any variations are "small" and "limited." App. 99a, 101a. "[M]ost all" employees wield a knife on the production line. App. 99a (district court finding); *see* App. 101a; JA210 (trial testimony that at least 70% wield a knife). Knife-wielding employees wear a combination of the following equipment: (1) a shield for their abdomen (either a "plastic belly guard" or a "mesh apron"); (2) protective gloves and sleeves for their hands and arms (some combination of a "mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, [or] membrane skinner gloves"); and (3) equipment to maintain and secure their knives (for example, a scabbard). JA118.

In addition to donning and doffing Tyson's required gear, all workers must retrieve it from the Tyson locker room before each shift, JA119, 147-50, including sorting out any gear Tyson laundered overnight, JA155, 230. All workers must walk to the production line carrying or wearing their required gear. JA120, 147-50, 152, 172-73. After the shift ends, all workers must carry their required gear back to the locker room for storage or cleaning. JA153-56, 179-81, 228-29.

"[T]he factual variations between employees paid via gang time are limited," as the district court found. App. 101a. All employees "wear some sort of PPE, and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE." App. 99a. "[M]ost all gang time employees wear at least the same basic PPE and use some kind of knife or tool." App. 101a. Thus, "there is not an indefinite amount of PPE to don and doff or tools to be used." App. 100a-101a.

Tyson's practice of rotating workers "quite often" between jobs that require knives and those that do not minimized any variation. JA210, 224-25, 235-36. Rotation occurs during the day or day-to-day; on a given day an employee might work a job that does not require a knife but switch to a job that does require a knife later the same day or the following day. JA210, 234-36.

3. Tyson's K-Code policy failed to pay any wages for time spent donning or doffing "standard" gear that was not "unique" to the meatpacking industry, including frocks, whites, rubber aprons, rubber gloves, rubber sleeves, cotton gloves, hairnets, beardnets, hardhats, and work glasses. JA176-78,

437-39. Tyson also paid no wages for time spent walking with company-issued gear and equipment to and from the locker room—time this Court held is compensable in *Alvarez*, 546 U.S. at 31-32, 37. JA121-22, 439-40. Because Tyson routinely scheduled all workers for six shifts a week in order to run the production line on Saturdays, that uncompensated time typically qualified for overtime compensation. JA182, 326, 437.

In February 2007, Tyson adjusted its K-Code policy to pay employees who worked with knives an additional 1-4 minutes of K-Code time to account for walking to and from the locker room. JA121-22. However, Tyson ceased paying employees who did not work with knives any time for any donning, doffing, or walking activities. JA121. Tyson continued to base K-Code compensation on averages from its 1998 time study. JA121. Throughout the class period, Tyson violated its statutory recordkeeping obligations and the *Reich* injunction by failing to record the amount of time workers spent performing these activities, including at Storm Lake. JA146-47, 174-76, 214-15.

On June 28, 2010—the class period cut-off date—Tyson increased the amount of K-Code time it paid to Slaughter and Processing employees to at least 20 minutes per shift, based on a new time study. *See* Def.'s Memo. of Law in Support of Its Mots. in Limine at 1-2, Dkt. 156-1.

C. Pre-Trial Proceedings

Respondents are employees on the Slaughter and Processing floors at Storm Lake who were paid via

the gang-time system. App. 92a, 110a.[2] In 2007, respondents filed a collective and class action, seeking compensation from Tyson under both the FLSA and the IWPCL for not paying overtime for company-required donning, doffing, and walking before and after shifts and during meal breaks. JA27, 39-42. Both claims have the same elements and standard of proof. *See* App. 5a n.2; JA479.

Respondents proposed a class including all workers at Storm Lake. The district court certified a Rule 23(b)(3) class on the state-law claim and granted conditional certification of an FLSA collective action. App. 41a-113a. Because the named plaintiffs were all Slaughter and Processing employees paid by gang-time, and because other employees at the facility were not paid by gang-time, the court narrowed the definition to include only employees on the Slaughter and Processing floors at Storm Lake who were paid under Tyson's gang-time system. App. 92a, 110a.

The court found that this narrowed class satisfied Rule 23. It determined that Tyson set a uniform compensation policy applicable to all class members. Respondents thus met Rule 23's "commonality requirement because they all share the common question of whether Defendant Tyson has violated [state law] by not paying production workers at its

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[2] Contrary to Tyson's suggestion (at 6), the class did not include employees to the extent they received additional pay for setting up or cleaning up the production line. JA433-34. Such employees were not paid by gang-time, App. 84a-85a, but from "clock in to clock out," C.A. App. 212. To the extent those employees were not paid by gang-time, they are excluded from the class and the collective-action definitions. App. 92a, 110a.

Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time.'" App. 97a (internal quotations omitted). The court further found that alleged "factual differences regarding the clothing and equipment" did not "defeat commonality among all employees paid on a gang time basis." App. 99a.

The court further concluded that common issues predominated over any individualized questions under Rule 23 because "common evidence that Tyson's compensation system cannot account for even the basic or standard PPE employees need to don, doff, and clean would establish a prima facie case for the class." App. 109a. The court also found that plaintiffs were "similarly situated" under the FLSA. App. 91a-93a.

Tyson did not oppose certification of the class or collective action on the ground that differences in the knife-safety PPE worn by employees would require individualized determinations of the time spent donning or doffing that would predominate over other questions. In opposing certification, Tyson argued that "[t]hree substantive legal issues *will dominate*" the litigation: (i) whether the activities at issue are "work" under the FLSA, (ii) whether they are "integral and indispensable" to plaintiffs' principal activities and therefore exempt under the Portal-to-Portal Act, and (iii) whether they are de minimis. Def.'s Resistance to Pls.' Mot. for Conditional Certification at 3, Dkt. 49 (emphasis added). According to Tyson, certification was inappropriate because these issues were not common. *Id.*

Before trial, Tyson moved to decertify the class in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See* App. 31a. Again focusing on commonality, Tyson moved for decertification based on alleged variations in the time spent by class members. Def.'s Mem. in Support of Its Mot. for Decertification of Rule 23 Class at 10, Dkt. 212-1. The court rejected Tyson's attempted analogy to *Wal-Mart*, "where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process." App. 37a. This case, by contrast, presented the common question whether Tyson, through its "company wide compensation policy" that is "applied uniformly throughout defendant's entire Storm Lake facility," had "paid its production workers for all 'work' performed prior and subsequent to 'gang time,' particularly the time spent donning, doffing, and cleaning' required equipment. *Id.* The court explained that, "[i]f it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes 'work' for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs." *Id.*

Respondents proposed bifurcating the trial so individual backpay amounts would be calculated separately after the common-liability phase. JA112-13. Tyson successfully opposed bifurcation as a "waste of resources," JA115, so damages and liability were tried together, JA486-88.

D. Trial Proceedings

1. At trial, four of the five questions tried to the jury were purely common issues: (1) whether donning and doffing sanitation gear and standard PPE were

"work" under the FLSA, (2) whether those activities were exempt from the FLSA's coverage under the Portal-to-Portal Act's exemption of "preliminary" and "postliminary" activities, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied to any of the contested activities. JA486-88 (verdict form). Tyson officials conceded that during the class period they did not pay workers for donning and doffing of required sanitation equipment and standard PPE (such as aprons, boots, frocks, hair nets, and rubber gloves), JA176-78, 437-39; and that they did not pay workers for walking to and from the locker room before February 2007, JA439-40.

Tyson officials also acknowledged they did not record workers' donning, doffing, washing, and walking time, JA146-47, 174-76, 214-15, although they conceded they could have done so by positioning punch-clocks outside the locker rooms and mandating that employees avoid detours between the locker room and the production line, JA207-09. Because Tyson kept no records of the actual time respondents spent donning, doffing, and walking, respondents relied on a variety of other evidence to establish those amounts of time. First, as in *Mt. Clemens*, several class members testified about the time they worked. JA255-65, 284-90, 306-09, 310-13. Second, the jury viewed videotapes of employees donning and doffing equipment on a typical workday at Storm Lake. *See, e.g.*, JA156-59. Third, the jury heard evidence that Tyson regarded the time employees spent as uniform enough to justify its policy of paying the same K-Code time to all Slaughter and Processing employees for donning and

doffing based on its own industrial engineers' study of average times. JA446-55; *see infra* pp. 18-19.

Finally, respondents presented a time study by an industrial-relations expert, Dr. Kenneth Mericle, to demonstrate the time spent by workers donning and doffing. JA336-45. A time study estimates the amount of time for employees to perform a task. JA336. Dr. Mericle's study was based on 744 videotaped observations of Storm Lake employees during two regular work days. JA336-45. Dr. Mericle recorded stopwatch measurements of the time each worker spent on donning and doffing tasks each day. *Id.* To determine walking time, Dr. Mericle used distances between relevant parts of the facility and applied standardized walking speeds, an "accepted procedure in industrial engineering." JA345, 363.

Dr. Mericle testified that his 744 observations were a high number for such a time study. JA358. He stated that his observed times were probably conservative, because he did not measure donning activities that workers completed while walking to the production floor and because Tyson officials had accompanied him during his observations—a practice that tends to make workers move faster than normal. JA356-58, 361-62. He further testified that, although the employees he videotaped were not selected on a strictly random basis—they were simply those workers who worked on the two days the study was performed—his sampling method "approximated random representation," because he did not preselect individuals known to be particularly fast or slow. JA359. Tyson relied on similar time studies to determine its K-Code time, JA446-55, and did not seek to exclude Dr. Mericle's testimony under

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Dr. Mericle calculated average times for donning, doffing, and walking of 18 minutes for workers in the Processing department and 21.25 minutes for workers in the Slaughter department. JA361-62. Most of the observed times clustered around the average. JA348. During trial, Dr. Mericle refined his calculations using statistical methods to exclude outliers, resulting in a 24-second decrease in the average total time for Slaughter and a 76-second decrease in the average total time for Processing. JA394-402.

Dr. Liesl Fox, a statistician whose qualifications were also unchallenged, applied Dr. Mericle's results to calculate the uncompensated time each individual employee worked. For each of the 3,344 class members, Dr. Fox added the donning, doffing, and walking times determined by Dr. Mericle's time study to Tyson's own records showing each worker's time on the production line. She then subtracted the amount of time Tyson's records showed each worker had been paid. Dr. Fox thus calculated, for each individual employee, whether the additional time entitled the worker to overtime pay and, if so, precisely how much additional overtime pay each individual worker was owed. JA403-08.

Using this methodology, Dr. Fox calculated that Tyson had unlawfully undercompensated more than 3,000 class members. Dr. Fox's individualized calculations showed that 212 workers—likely part-time employees—were entitled to no damages because they did not work more than 40 hours in any

workweek. JA415, 429-30. Dr. Fox specifically identified each worker not entitled to damages.

Respondents asked the jury to award a total of $6,686,082.36 in damages—the sum of the individual damages suffered by the more than 3,000 injured class members calculated by Dr. Fox. JA465. Dr. Fox also presented a calculation using Dr. Mericle's refined results, which resulted in total damages of $6,198,191.67. JA428-29. The jury also viewed spreadsheets containing Dr. Fox's individualized damages calculations for each class member. C.A. App. 904-72, 1004-83.

2. Tyson cross-examined Drs. Mericle and Fox but did not present an independent rebuttal expert. Moreover, Tyson's own industrial engineer, Jim Lemkuhl, corroborated the reliability of Dr. Mericle's methodology. Lemkuhl testified that Tyson based its K-Code payments on an internal time study of donning and doffing times performed in 1998. JA446-55. In that study, Tyson positioned engineers where donning and doffing took place and observed whichever workers happened to arrive, JA462—just as Dr. Mericle did in his study, JA358-59. Tyson then averaged together different employees' donning and doffing times, JA453-55—like Dr. Mericle's study, JA336-37. Tyson's study, unlike Dr. Mericle's, even averaged different employees across different plants. JA453-55.

When asked about Tyson's method of timing employees donning specific items in isolation, as compared to Dr. Mericle's method of timing employees putting on all their gear together, Lemkuhl admitted the equipment was "an ensemble" and that, in his professional judgment, donning and

doffing of all equipment should be studied in combination. JA458-59. Lemkuhl also admitted that, for some items in its multi-plant study, Tyson did not observe someone in each plant, JA461, and that Tyson never studied certain gear that workers are required to wear, including aprons, frocks, whites, hairnets, beardnets, earplugs, and muffs, JA457. When Tyson decided in 2007 to begin paying some workers for walking to and from the locker room, it multiplied the measured distance by a standard walking speed, JA443-45—just as Dr. Mericle did, JA345, 363.

3. Tyson did not object to the jury instructions, JA464, which required completion of a special verdict form posing yes/no questions to determine liability, JA486-88. The court instructed that "[y]ou may not award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid." JA471-72. "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." JA481.

At Tyson's request, the court instructed the jury it could award damages to non-testifying class members based on "representative evidence." JA472. Tyson's proposed instruction, which was given nearly verbatim, stated that, "if some employees testify about the activities they allegedly performed or the amount of unpaid overtime they allegedly worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This is called 'representative testimony.'" JA93 (proposed instruction); JA472 (actual instruction). Consistent

with *Mt. Clemens*, the jury was also instructed, again at Tyson's request, that plaintiffs carried their burden to prove damages

> if they prove that the employees have in fact performed work for which they were not paid and produce sufficient evidence to show the amount and extent of such work *as a matter of just and reasonable inference.*
>
> The burden then shifts to the defendant to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from plaintiffs' evidence. *If the defendant fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.*

JA480-81 (emphases added); *cf.* JA100-01 (Def.'s proposed jury instruction No. 23).

Tyson also proposed, and the court adopted, a verdict form calling for the jury to provide a single total damages award. *See* JA8, 102-04 (Tyson's proposed verdict form), 486-88 (actual verdict form).

4. The jury returned a verdict for respondents. JA486-88. The jury found that: the donning and doffing was work; that work was integral and indispensable to the workers' principal activities and therefore not exempt under the Portal-to-Portal Act; it was not de minimis; and Tyson did not fully compensate its employees for that work. *Id.* However, the jury found in Tyson's favor that the meal breaks were bona fide and therefore not compensable. *Id.* The jury awarded compensatory damages of approximately $2.89 million. JA488.

The court awarded an equal amount in liquidated damages, resulting in a judgment of approximately $5.8 million. JA20.

The court denied Tyson's post-trial motions, including a motion to decertify the class on the ground that individual issues would predominate in the litigation. App. 30a.

E. Appellate Proceedings

1. The court of appeals affirmed. The court rejected Tyson's argument that variations among class members in donning and doffing time defeated class certification under *Wal-Mart*. The court explained that, unlike in *Wal-Mart*, Tyson applied a single policy to all class members. App. 8a. Moreover, because Tyson violated its statutory recordkeeping obligations, respondents could rely on representative proof under *Mt. Clemens*. *Id.* Respondents' time-study evidence was "comparable" to the evidence in *Mt. Clemens* and could likewise establish the amount of uncompensated time for the class. App. 11a. The court further noted that the class used individual employee time records, App. 10a, to "apply this [representative] analysis to each class member individually," App. 11a. The court thus rejected Tyson's claim that this was an inappropriate "trial by formula." App. 10a-11a.

The court also rejected Tyson's argument that insufficient evidence supported the verdict, finding that Dr. Mericle's time study employed a well-accepted and reliable methodology because of its large and representative sample. The court declined to address Tyson's argument that a class cannot contain any uninjured members, because Tyson's requested jury instructions invited any error. App. 8a-10a.

Judge Beam dissented, arguing that individual differences in donning and doffing times made class treatment inappropriate, App. 21a-23a, and that the class and collective claims should have been treated separately, App. 23a-24a.

2. The court denied Tyson's petition for rehearing and rehearing en banc. App. 114a. Judge Beam again dissented, arguing that the panel decision misapplied *Mt. Clemens*, App. 119a-122a, and that the verdict would compensate individuals with no or de minimis damages, App. 122a-125a. Judge Benton's separate opinion defending the panel's decision observed that "[t]he [district] court, without objection, instructed the jury *only* as to aggregate damages." App. 130a (citing the verdict form; emphasis added). He further explained that, based on the jury instructions, "employees without damages are not entitled to allocation of the award." App. 131a.

SUMMARY OF ARGUMENT

I. The district court properly exercised its discretion in concluding that common questions would dominate this litigation.

A. Rule 23(b)(3) requires that common issues "predominate" over individualized ones. Evaluation of the common issues in a class action includes the substantive legal standards underlying the claims. This Court's *Mt. Clemens* decision provides an evidentiary standard to apply when a company such as Tyson fails to comply with its statutory recordkeeping requirements.

B. Indisputably common issues predominated. Respondents' claims raised four common contentions about whether their work was compensable under federal and state wage-and-hour laws: (1) whether

the activities at issue were "work," (2) whether they were exempt from FLSA coverage under the Portal-to-Portal Act, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied.

Those questions were central throughout the litigation. Tyson admitted it adopted a company-wide policy of not paying wages to any class members for walking time (for part of the class period) or time spent donning and doffing the company's sanitation gear and standard PPE. Tyson defended that practice on a classwide basis, contending that respondents' activities were not compensable because those activities were (1) not "work"; (2) not "integral and indispensable" to workers' principal activities under the Portal-to-Portal Act; and (3) de minimis. Tyson conceded that those issues would "dominate" the litigation and did not argue that the number of hours individuals spent on compensable work would predominate over them.

The course of the trial confirmed the predominance of common issues. Four of the five questions on the verdict form were compensability issues, JA486-88, which Tyson ignores in its opening brief. The court did not abuse its discretion in finding—as Tyson itself conceded—that issues regarding the compensability of respondents' work predominated.

C. The sole issue Tyson now claims is individualized is the number of hours class members spent on compensable activities. Had Tyson retained proper records of those hours, as required by the FLSA and Iowa law, resolving that issue would have been mechanical and common compensability questions would clearly predominate.

Because Tyson violated its statutory recordkeeping duties, respondents relied on *Mt. Clemens* to demonstrate the "approximate" time worked "as a matter of just and reasonable inference." 328 U.S. at 687-88. The *Mt. Clemens* rule operates like other evidentiary principles affirmed by this Court, and its reasonable approximation standard "is an objective one" that "can be proved through evidence common to the class." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) (internal quotations omitted).

Consistent with *Mt. Clemens*, respondents adduced common evidence sufficient to approximate class members' compensable time and facilitate the damages computation. Respondents offered testimony of representative plaintiffs at trial, as in *Mt. Clemens*, 328 U.S. at 683, and also presented a reliable time study using the average of a large number of observations of plant workers. Dr. Mericle's time study was *more* rigorous than the sample employee testimony accepted in *Mt. Clemens*, which involved eight workers testifying on behalf of 300. *Mt. Clemens* enabled respondents to prove the amount of compensable time with common evidence for the entire class.

Tyson's attacks on the lower courts' reliance on *Mt. Clemens* are unpersuasive. *Mt. Clemens* forecloses Tyson's complaint (at 35) that Dr. Mericle's time study improperly "mask[ed] differences among class members." Dr. Mericle's study provides precisely the sort of common proof sufficient to create a "just and reasonable inference" for all employees. 328 U.S. at 688. Tyson's argument that this Court should limit *Mt. Clemens* to determining the amount of damages rather than whether plaintiffs have

exceeded the overtime threshold lacks support in precedent or logic: in both cases the evidence proves by inference the amount of time worked. The theoretical possibility that Tyson might have attempted to rebut the class's proof with individual evidence did not defeat predominance because Tyson offered no reason to think such evidence would overwhelm common issues.

D. The district court also did not abuse its discretion in certifying the FLSA class. Tyson concedes the FLSA collective-action standard is no *more* stringent than Rule 23. Tyson offers no sustained argument that the FLSA's separate "similarly situated" requirement is not met. The FLSA's plain text does not require predominance.

E. Tyson's arguments that certifying the class violated the Rules Enabling Act and the Due Process Clause lack merit. Certification did not lessen respondents' burden of proof: the district court properly applied *Mt. Clemens*' evidentiary standard, a *substantive* rule of law triggered by Tyson's violation of recordkeeping requirements. Tyson had every opportunity to rebut respondents' classwide proof by presenting evidence of actual time worked or rebutting respondents' inferential proof. Tyson's repeated invocation of the *Wal-Mart* mantra "trial by formula" is misplaced. *Wal-Mart* disapproved certification where the plaintiffs sought to prove each class member's separate discriminatory treatment from a sample set of class members. Nothing like that occurred here: respondents relied on ample representative proof, as expressly approved in *Mt. Clemens*, to address the employer's classwide non-compliance with mandatory recordkeeping requirements.

II. Tyson now concedes respondents are correct on the second question presented: Article III, it acknowledges (at 49), "does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." That concession flows from the well-settled principle that a court has jurisdiction if a single plaintiff has standing—a principle as applicable to class actions as to other joinder mechanisms. Because Tyson no longer contests that proposition, this Court should either affirm on the second question or dismiss the petition on that question as improvidently granted.

Tyson also presses a new argument, not raised in its petition—that the district court erred by "*award[ing] damages* to class members who cannot prove injury." Pet. Br. 46 (emphasis added). The Court should not reward Tyson's shifting tactics by considering that contention. Nonetheless, Tyson's argument is baseless. It rests largely on the verdict's award of a single, unallocated sum to the whole class. Tyson invited any such error by insisting on an aggregated verdict, and it lacks standing to complain about allocation of the verdict, which cannot change Tyson's liability. In any event, the judgment does not award damages to, or on account of, uninjured people. The jury was instructed not to award damages to uninjured class members and had the evidence needed to avoid doing so. Finally, Tyson's passing challenges (at 53) under the Seventh Amendment and the Due Process Clause also lack merit, because court approval of an allocation plan would neither reopen the judgment nor reallocate damages.

ARGUMENT

I. CERTIFICATION WAS PROPER BECAUSE THE COMPENSABILITY OF RESPONDENTS' WORK AND THE REASONABLENESS OF THEIR TIME ESTIMATES WERE COMMON TO THE CLASS

A. Predominance Is Satisfied Under Rule 23(b)(3) If Common Issues Outweigh Individualized Issues

Rule 23(b)(3) provides that a damages class action satisfying Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation may be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Commonality (which Tyson no longer contests) requires at least one "common contention" whose resolution will resolve a "central" issue "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," only that common questions "predominate" over individualized ones. *Amgen*, 133 S. Ct. at 1196 (internal quotations and alterations omitted); *American Heritage Dictionary of the English Language* (5th ed. 2011) ("predominate" means "[t]o be of or have greater quantity or importance"). If questions affecting only individual class members do not "overwhelm common ones," *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("*Halliburton II*"), the class is

"sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

The certification inquiry must reflect substantive legal standards applicable to plaintiffs' claim, as Tyson concedes (at 23). This Court repeatedly has looked to relevant substantive law in deciding whether certification is proper. *See Erica P John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (certification depends on "elements of the underlying cause of action"); *Wal-Mart*, 131 S. Ct. at 2551-52 (certification is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (internal quotations omitted). Because a key question is whether plaintiffs can establish their claims through "classwide proof," *Amgen*, 133 S. Ct. at 1196, predominance must consider evidentiary standards—such as the *Mt. Clemens* standard—that permit use of common evidence. *See Halliburton II*, 134 S. Ct. at 2412 (finding predominance satisfied in securities-fraud cases because fraud-on-the-market evidentiary presumption of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), obviates the need to prove individual reliance).

Certification is a highly contextualized inquiry based on the facts and the parties' actual litigation positions. *See Amchem*, 521 U.S. at 630 (Breyer, J., concurring in part and dissenting in part) (certification raises "highly fact-based, complex, difficult matters"). As *Wal-Mart* counseled, courts should focus on questions actually "apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (internal quotations omitted); *see also Amchem*, 521 U.S. at 623 (predominance "inquiry trains on the legal or factual questions that qualify each class

member's case as a genuine controversy"); Fed. R. Civ. P. 23(b)(3)(A)-(D) (listing "pertinent" factors reinforcing practical nature of predominance inquiry). Consequently, whether to certify a class is committed to the district court's sound discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Abuse of discretion is a "difficult standard" to meet, *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 408 (1990), as it "reflects the district court's superior familiarity with, and understanding of, the dispute," *United States v. Clarke*, 134 S. Ct. 2361, 2368 (2014).

B. As Tyson Admitted Below, Compensability Issues "Dominate[d]" The Litigation

The district court acted well within its discretion in concluding that common questions regarding the compensability of respondents' work activities would predominate. Respondents' claims raised four "common contention[s]," *Wal-Mart*, 131 S. Ct. at 2551, under federal-law and state-law wage-and-hour standards: (1) whether respondents' activities were "work," (2) whether they were exempted under the Portal-to-Portal Act, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied.

Those questions were "central" throughout the litigation. *Id.* Respondents proved that virtually all class members worked significantly more than 40 hours per week without the unpaid time because Tyson's officials admitted that the vast majority of class members routinely worked six-day, 48-hour workweeks. JA122, 181-82, 326, 437. The fact of unpaid wages was also established by Tyson's admission that it adopted a company-wide policy of not paying wages to class members for walking time

or time spent donning and doffing the company's sanitation gear and standard PPE—equipment every class member was required to use, which did not vary among class members in the same department. *See supra* pp. 9-10.

Tyson's defense throughout was that respondents' activities were not compensable because they were (1) not "work"; (2) not "integral and indispensable" to workers' principal activities under the Portal-to-Portal Act; and (3) de minimis. *See supra* p. 13. Indeed, in opposing certification, Tyson conceded that those issues would "dominate" the litigation:

> Three substantive legal issues will dominate this FLSA litigation: (i) whether the clothes-changing and washing activities are "work" for purposes of the FLSA; (ii) which specific pre- and post-shift clothes-changing or sanitizing activities, if any, are "integral and indispensable" to plaintiffs' principal production activities within the meaning of the Portal-to-Portal Act and thereby commence and end the continuous workday, and (iii) whether, even if the activities are otherwise compensable, they are *de minimis* and therefore not compensable.

Def.'s Resistance to Pls.' Mot. for Conditional Certification at 3, Dkt. 49; *see also id.* at 26-27. Tyson argued that those questions were not common—a point the district court rejected, Tyson did not challenge below, and is no longer disputed here. But Tyson did not argue that the number of hours spent on compensable work would predominate over those questions. Tyson waived that argument by not raising it—and, indeed,

arguing the contrary—below. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (per curiam).

The trial confirmed the district court's conclusion that the common compensability questions would "drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (internal quotations omitted). Tyson's opening statement distilled two key issues "in dispute": (1) whether donning and doffing "standard items" was "integral and indispensable" and thus compensable under the FLSA; and (2) whether Tyson properly compensated workers for time donning and doffing "knife-safety" gear, like belly guards. Trial Tr. 27-28. Tyson's counsel argued that its "defenses" were that (1) donning and doffing standard items is not "work" because it requires no exertion; (2) donning and doffing PPE is not "work" because it is "primarily for the benefit of the employee" rather than Tyson; (3) donning and doffing is not compensable under the FLSA because it is "preliminary"; and (4) donning and doffing time was "de minimis." *Id.* at 32-33.

Most of the trial focused on common proof regarding those questions. Storm Lake managers testified about whether Tyson's PPE policies were primarily for the benefit of Tyson, workers' practices during meal breaks, and Tyson's recordkeeping practices regarding donning and doffing time. *Id.* at 40-176, 407-545, 545-57, 716-29. Storm Lake's human resources and payroll managers explained Tyson's gang-time system. *Id.* at 176-344, 345-406.

Tyson's witnesses also focused on classwide compensability issues. Tyson called a safety manager to testify that workers wore PPE for their own safety rather than Tyson's benefit; and its

human resources director, who testified regarding Tyson's PPE requirements, the practicability of having workers clock in before donning PPE, and the meal break schedule. *See, e.g., id.* at 1467, 1472, 1474. Mr. Lemkuhl testified about the K-Code system and its origin in the 1998 time study he performed. *See supra* p. 18.

Finally, four of the five jury verdict form questions were compensability issues. JA486-88. Tyson all but ignores these common questions. But the district court's ultimate decision to maintain certification—made after trial—was not an abuse of discretion in finding, as Tyson had conceded, the issues regarding the compensability of respondents' work predominated.[3]

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[3] The common compensability questions suffice for certification under the rule—adopted by all eight courts of appeals that have considered the issue—that individual damages calculations do not categorically defeat predominance. *See Neale v. Volvo Cars of N. Am., LLC*, 2015 WL 4466919, at *17 (3d Cir. 2015); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23, 25 (1st Cir. 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257-58 (10th Cir. 2014), *pet. for cert. pending*, No. 14-1091 (filed Mar. 10, 2015); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir.), *cert. denied*, 135 S. Ct. 754 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013); *cf. Reyes v. Netdeposit, LLC*, 2015 WL 5131287, at *7 n.12, *15 (3d Cir. 2015) (stating in dicta in a footnote that damages must be measurable on classwide basis, but reaffirming in the main text that "Rule 23 does not require the absence of all variations in a defendant's conduct or the elimination of all individual

(*Footnote continued*)

C. Under *Mt. Clemens*' Inferential Proof Standard, Individual Questions Do Not Predominate

1. Had Tyson retained required time records, common issues indisputably would have predominated

The sole individualized issue now claimed by Tyson is the number of hours class members spent on compensable activities. Had Tyson maintained records of those hours, respondents would have had precise information regarding the time each employee spent on compensable but uncompensated donning, doffing, and walking activities. Then, exactly as Dr. Fox did, they would have added those hours to the number of hours Tyson recorded for each employee's work on the production line.

Under those circumstances, the question of each employee's hours and damages would not defeat predominance. The need for mechanical computation does not raise the specter of individual mini-trials or undermine the ability of a single proceeding to resolve class members' claims "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551; *see Halliburton II*, 134 S. Ct. at 2415 (approving use of far more complex

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circumstances"). Although this Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), criticized the plaintiffs for not "establish[ing] that damages are capable of measurement on a classwide basis," *id.* at 1433, the Court did not decide whether Rule 23(b)(3) requires a classwide measure of damages because the plaintiffs had stipulated that a classwide measure was necessary for predominance in that particular case. The Court need not decide the issue here because, as explained below, the issue of time worked was also subject to common proof under *Mt. Clemens*.

computations). Accordingly, lower courts agree that the need to compute damages "according to some formula, statistical analysis, or other easy or essentially mechanical methods" poses no impediment to class certification. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) (footnotes omitted), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also, e.g., Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (citing cases); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 67-68 (4th Cir. 1977) (en banc).

Common evidence also established that almost all class members worked more than 40 hours a week, even without the additional time established by Dr. Mericle's time study. JA182, 326, 437. Thus, if Tyson had maintained legally required time records, the class easily would have met Rule 23's predominance standard.

2. *Mt. Clemens* permits reasonable classwide approximations to prevent defendant's recordkeeping violations from impeding classwide resolution

Having violated its statutory obligations, Tyson argues that the absence of time records required mini-trials regarding the precise time each employee spent on uncompensated activities, and that those individualized inquiries "overwhelm" the common questions. *Mt. Clemens* forecloses that argument.

Mt. Clemens holds that, when an employer violates the law by failing to keep records of time worked, employees can prove the "approximate" time worked "as a matter of just and reasonable inference." 328 U.S. at 687-88. The employees'

reasonable approximation shifts the burden to the employer to prove actual time worked or to negate the reasonableness of inferences from plaintiffs' evidence. *Id.* *Mt. Clemens*' evidentiary standard is a substantive rule of law permitting all class members to proceed based on an objective standard (reasonable approximation), pursuant to common proof. *Mt. Clemens* facilitated class certification by obviating the need for individualized inquiries into each employee's actual uncompensated hours.

The *Mt. Clemens* rule operates like the fraud-on-the-market presumption established in *Basic* and reaffirmed in *Halliburton II*. That presumption permits securities-fraud plaintiffs to prove reliance based on "objective," "classwide" evidence and prevents individualized reliance questions from "overwhelming" common ones. *Halliburton II*, 134 S. Ct. at 2407-08, 2416; *accord Amgen*, 133 S. Ct. at 1195-96. Likewise, *Mt. Clemens*' reasonable approximation standard "is an objective one" that "can be proved through evidence common to the class." *Id.* at 1195 (internal quotations omitted).

In *Mt. Clemens*, "testimony from eight employees established liability for 300 similarly situated workers." App. 11a. Although the eight employees' estimates of their compensable walking time ranged from 30 seconds to 8 minutes, their testimony sufficed to "approximate" the entire class's compensable hours. *See* 328 U.S. at 688; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 461-63 (6th Cir. 1945). Because, as the district court and the court of appeals held and Tyson does not challenge, the same substantive standards apply to both Iowa law and the FLSA claim, App. 5a n.2; JA479, *Mt. Clemens* determines how employees may

prove the amount of time worked when an employer has not kept records.

The rationale for *Mt. Clemens* burden-shifting is that the employer created the problem of proof by breaking recordkeeping laws: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of the [FLSA]." 328 U.S. at 688; *see also* Iowa Admin. Code 875-216.2(1)(g) (parallel Iowa recordkeeping requirement). Allowing such an objection would "place a premium on an employer's failure to keep proper records in conformity with his statutory duty." 328 U.S. at 687. Such a presumption relieves plaintiffs "of an unnecessarily unrealistic evidentiary burden," *Halliburton II*, 134 S. Ct. at 2407 (internal quotations omitted), by placing the onus on the party in the "position to know and to produce the most probative facts concerning the nature and amount of work performed," *Mt. Clemens*, 328 U.S. at 687. *Mt. Clemens* burden-shifting incentivizes legal compliance, puts the burden on the party best equipped to bear it, and avoids the perverse consequence of allowing employers that violate recordkeeping requirements to shield themselves from liability for wage-and-hour violations.

Legal uncertainty does not excuse an employer's failure to keep records, as *Mt. Clemens* explained: "[E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most

accurate basis possible under the circumstances." *Id.* at 688.

Mt. Clemens burden-shifting has been established law for nearly 70 years and this Court has never questioned it. Every federal circuit has adopted it as a settled evidentiary principle. *See, e.g., Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 306 (5th Cir. 1998); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994).

Similar burden-shifting requirements exist throughout the law, based on the "ancient" premise of equity that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (permitting proof by inference in antitrust case, and noting its use in admiralty, confusion of goods, and intellectual property); *see also, e.g., Combs v. King*, 764 F.2d 818, 826-27 (11th Cir. 1985) (permitting burden-shifting by analogy to *Mt. Clemens* under ERISA); *Am. Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1409-10 (10th Cir. 1984) (same, under Service Contract Act). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery . . . Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." *RKO*, 327 U.S. at 264-65. The *Mt. Clemens* burden-shifting framework was crafted for precisely the circumstances of this case.

Indeed, *Tyson* conceded *Mt. Clemens*' applicability below. It asked the district court to instruct the jury that it could infer from testimony about time spent

by one worker that other workers in substantially similar positions spent the same amount of time. JA93. The instructions given were practically identical to Tyson's proposal. JA472. And none of Tyson's briefing on certification before trial objected to inferential proof under *Mt. Clemens*. *See* Dkts. 45, 49, 212-1, 226-1.

3. Consistent with *Mt. Clemens*, respondents proved the approximate amount of compensable time through common evidence

As *Mt. Clemens* permitted, respondents adduced common classwide evidence sufficient to approximate class members' compensable time and allow the resulting computation of damages. Respondents offered testimony from several representative plaintiffs at trial, as in *Mt. Clemens*, 328 U.S. at 683, and also presented a reliable time study performed by Dr. Mericle using the average of hundreds of observations of workers at the plant. Indeed, Dr. Mericle's time study was *more* rigorous than the sample employee testimony accepted in *Mt. Clemens*, which involved eight workers testifying on behalf of 300 with no objective observations of employees' activities. Under *Mt. Clemens*' reasonable-approximation standard, respondents could use such common evidence to prove the amount of compensable time for the entire class, so individual issues did not predominate. *See* App. 8a.

Accordingly, Tyson's repeated suggestion that respondents' case assumed that the time they spent donning and doffing was equal to that of a "hypothetical" or "average" worker misunderstands the *Mt. Clemens* rule. When employees proceed

under *Mt. Clemens*, they do not ask the fact-finder to make any such "assumption." Rather, they ask the fact-finder to draw a "just and reasonable inference" using the "average" times as a fair approximation. 328 U.S. at 686-88. Here, consistent with *Mt. Clemens* and Tyson's own proposed instruction, the district court properly instructed the jury that it could draw an inference from respondents' classwide evidence, including representative class members' testimony, 744 videotaped observations, and Dr. Mericle's time study. JA472.

Tyson's attacks on the lower courts' reliance on *Mt. Clemens* are unpersuasive.

a. Tyson contends (at 35) respondents' time-study evidence was not common because it "mask[ed] differences among class members." But *Mt. Clemens*' core holding is that, where the defendant has deprived workers of accurate records, proof of the *precise* number of hours each employee worked is *not* "essential to determining" liability or damages. Workers may satisfy their evidentiary burden through reasonable approximation under an objective, classwide standard. Lower courts therefore regularly allow proof of wage-and-hour claims using time studies or other measures that average time worked by different workers. *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1306-07 (10th Cir. 2014); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 370-72 (4th Cir. 2011); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981).

Tyson nonetheless contends that the differences here were too great to allow classwide representative evidence. But that assertion challenges the sufficiency of respondents' evidence, not the propriety

of class certification. *See* Pet. Br. 33-35 (arguing respondents could not "prove" their damages); *see also* Civil Procedure Scholars Amicus Br. 24 (arguing evidentiary insufficiency). Respondents need not "win the fray" to show *certification* was proper. *Amgen*, 133 S. Ct. at 1191. The sufficiency of their evidence, as opposed to whether the case was triable as a class action, is outside the question presented.

In all events, the differences among respondents are much smaller than those among the employees in *Mt. Clemens*. There, minimum distances between time clocks where employees punched in and their working places "var[ied] from 130 feet to 890 feet," and "estimated walking time rang[ed] from 30 seconds to 3 minutes," with some estimates "as high as 6 to 8 minutes." 328 U.S. at 683. Moreover, "employees perform[ed] various [allegedly compensable] preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* The Court held that testimony of eight representative plaintiffs created a "just and reasonable inference" for all 300 employees despite these differences. *Id.* at 687-88.

The evidence here supports an even stronger inference. As the district court found, "most all [class members] wear at least the same basic PPE and use some kind of knife or tool," and "there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited." App. 101a. *All* employees were required to walk to the

production line from the locker room with required gear, JA150, and *all* employees were required to wear basic sanitation gear, JA233-34. Although Tyson seeks to distinguish knife-wielders from non-knife-wielders, employees rotated between those categories. JA234-35, 236. Tellingly, Tyson itself considered respondents sufficiently alike that it used a similar time-study methodology to determine the amount of its K-Code time.

Moreover, Tyson's suggestion (at 11) that there were vast differences in the time it takes to don and doff gear misapprehends the factual record and Dr. Mericle's time study. The observations at the very low end of the range resulted in part from the fact that some employees continued to don and doff their gear after they left the locker room. JA350-51. Because Dr. Mericle's conservative methodology did not include those employees' donning and doffing between the locker room and the production floor, it overstated the variations in workers' donning and doffing times and understated the average times for the group.

Tyson's reliance on *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), is misplaced. Even assuming *Espenscheid* was correct in resolving the issue at the class-certification stage, the variations among employees were different in kind from those here. There, the employees were home-satellite repair technicians paid per job, not per hour, *id.* at 772-73, so the "hourly wage varie[d] from job to job and worker to worker," *id.* at 774. The plaintiffs alleged that the employer forbade them from reporting certain hours, *id.* at 773, but some further underreported their time not because of that policy "but because [they] wanted to impress the company

with [their] efficiency," *id.* at 774. Compounding these problems was the absence of any "suggestion that sampling methods used in statistical analysis were employed." *Id.* Here, by contrast, plaintiffs' expert testified that his time study contained a large number of observations, JA358, and that the study was representative and "approximate[d] random representation," JA359. *Espenscheid*'s conclusion that differences among employees were too great to support a "just and reasonable inference" on that case's distinct factual record does not suggest the same result here given the district court's factual finding that variations among respondents were "small." App. 99a.

Tyson advocates (at 42) a standard of hyper-precision that would require classwide evidence to capture every minuscule variation in workers' time. *Mt. Clemens* rejects such a standard. Workers are not robots. Small differences among workers in performing tasks are inevitable no matter how similarly situated they are. Even a single worker can vary in his daily routines. *See, e.g.*, JA260, 265 (class member Lovan estimating range of 17-19 minutes for activities at issue). Tyson's argument (at 35) that common evidence cannot "mask differences" would bar even the inference that a worker who spent 18 minutes donning and doffing on Monday spent the same amount of time on Tuesday. Had Tyson kept lawful, accurate records, it could have tracked (and avoided damages for) such minor variations. Because Tyson did not, *Mt. Clemens* permitted respondents to proceed through reasonable classwide approximation.

b. Tyson argues (at 41) that *Mt. Clemens* applies only when the amount of time worked affects only

how much overtime workers are owed rather than whether they exceeded the 40-hour overtime threshold. But, where the "liability" question is simply whether an employee suffered any damages, that distinction is untenable: finding that damages are zero is the same as finding no liability. And limiting *Mt. Clemens* as Tyson requests is inconsistent with its central rationale: preventing employers that violate recordkeeping duties from reaping a windfall. It would be perverse to permit defendants to avoid liability altogether based on that statutory violation.

Distinguishing liability from damages is also unworkable in this context because it would provide incompatible standards of proof for a single fact in the same litigation: amount of work. That fact is the same whether supporting "liability" or "damages." Limiting representative proof to one use and not the other "makes no sense, and can readily lead to bizarre results," including convoluted jury instructions under which the same fact would have to be proven under different standards for different purposes. *Halliburton II*, 134 S. Ct. at 2414-15 (rejecting argument that defendants may introduce price-impact evidence to counter market efficiency but not to rebut presumption of reliance).

Because the distinction is untenable, it is unsurprising that appellate courts explicitly permit inferential proof to show both whether and how much overtime is owed. *See, e.g.*, *Garcia*, 770 F.3d at 1307 ("[T]he jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities."); *accord Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997); *Martin v. Selker Bros., Inc.*, 949

F.2d 1286, 1298 (3d Cir. 1991); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589-90 (9th Cir. 1988); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985), *abrogated on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).

Moreover, because the distinction between "no liability" and "no damages" is empty, defendants can readily turn damages issues into liability issues. Under the FLSA, for instance, employers could claim the "de minimis" exception and thereby avoid burden-shifting because that question goes to liability rather than damages. *See Mt. Clemens*, 328 U.S. at 692.

Tyson misreads (at 41) *Mt. Clemens*' statement that its rule applies when "damage is certain" and the "uncertainty lies only in the amount of damages." 328 U.S. at 688. As the Court explained, the right to proceed through inferential proof is triggered when the employer categorically fails to pay employees for compensable activities—when "the employee has proved that he has performed work and has not been paid in accordance with the statute," *id.*, or "that he has in fact performed work for which he was improperly compensated," *id.* at 687-88. Here, all respondents satisfied that prerequisite by proving they were "improperly compensated" for work—walking and donning/doffing certain gear. Respondents were never compensated for donning and doffing sanitation gear and standard PPE. From 2004-2007, no class member was compensated for time walking to and from the locker room—time the jury found part of the continuous

workday (and therefore compensable). *See Alvarez*, 546 U.S. at 37. Tyson thus systematically failed to pay class members for compensable work, and *Mt. Clemens* authorized respondents to calculate their overtime damages based on classwide, representative proof.

4. Tyson's opportunity to rebut respondents' classwide proof did not defeat predominance

Under *Mt. Clemens*, respondents' inferential proof shifted the burden to Tyson "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-88.

But, even if Tyson had tried to rebut the *Mt. Clemens* presumption with evidence specific to individual class members (which it did not), "there [would have been] no reason to think that these questions [would] overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2412. In *Halliburton II*, this Court recognized that, although the rebuttable nature of the fraud-on-the-market presumption "has the effect of leaving individualized questions . . in the case," individualized rebuttals do not defeat certification unless they are so widespread as to "overwhelm" the other common questions in the case. *Id.* (internal quotations and alteration omitted). The possibility "the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

Here, as in *Halliburton II*, there was "no reason to think" rebuttal evidence would "overwhelm" common questions. A defendant in Tyson's position often has no interest in mounting individualized rebuttals to a time study employing arithmetical averages because such a strategy would not reduce its aggregate damages, but merely reallocate them differently across the class by showing that some class members worked less than the average while others worked more.

Tyson's own litigation conduct illustrates that point. Beyond cross-examining respondents' representative witnesses, Tyson made no effort to adduce employee-specific rebuttal proof. At every turn, Tyson decided to forgo individualized rebuttal. It did not call individual class members to elicit testimony about time spent on compensable activities. When respondents offered to bifurcate liability and damages, Tyson opposed it as a "waste of resources." JA111-15. And Tyson affirmatively requested that the jury provide a lump-sum damages award rather than individual awards. JA8, 102-04, 464.

Tyson claims it could not take discovery on individualized issues once the court certified the class, but courts routinely permit discovery of absent class members. "'[T]he overwhelming majority of courts which have considered the scope of discovery against [absent class members] have concluded that such discovery is available.'" *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1332-33 (11th Cir. 2013) (Pro, J., dissenting in part and concurring in part) (quoting *Dellums v. Powell*, 566 F.2d 167, 187 (D.C.

Cir. 1977)).[4] In fact, Tyson deposed 22 class members and designated testimony from six for trial use; Tyson's strategic choice not to use that testimony does not prove it lacked the opportunity to do so. *Cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (distinguishing "right to pursue" a claim and economic incentive to do so).

Tyson was not deprived of any "right to raise individualized defenses." Pet. Br. 38. It made a strategic decision not to expend resources on individualized rebuttals to Dr. Mericle's time calculations and chose to respond with evidence common to the class, validating the district court's determination that common questions would predominate. Now that its all-or-nothing strategy has failed, Tyson cannot get a do-over by objecting to certification based on individualized defenses it declined to pursue. Permitting Tyson to defeat certification now on that basis would eviscerate *Mt. Clemens*' core purpose of preventing defendants from benefiting by their own misconduct. Given Tyson's strategic choice to forgo individualized rebuttals, the district court did not abuse its discretion in concluding that individualized issues would not overwhelm the common questions respondents' case presented.

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[4] The Newberg treatise cited by Tyson (at 37-38) cites three district court cases—hardly demonstrating a "general" rule against class discovery on individualized issues. As the district court did here, other district courts have permitted discovery on individual issues in class litigation. *See, e.g., In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 2014 WL 5392465, at *2 (S.D.N.Y. 2014); *Laborers Local 17 Health & Ben. Fund v. Philip Morris, Inc.*, 1998 WL 241279, at *3 (S.D.N.Y. 1998).

D. The FLSA Collective Action Was Properly Certified

The collective action's certification was proper under FLSA § 216(b). Because Tyson concedes the collective-action standard is *no more stringent* than Rule 23, the Court should affirm the collective-action certification for the same reasons class certification was proper under Rule 23.

Apart from a single lower-court decision suggesting that the FLSA and Rule 23 standards are functionally equivalent, Pet. Br. 26, Tyson offers no sustained argument that the FLSA's separate "similarly situated" requirement is not met. To the extent the Court addresses the scope of § 216(b), it should reject Tyson's interpretation as inconsistent with the statute's plain language, which does not incorporate Rule 23's requirements. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) ("To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 would effectively ignore Congress' directive."). Most appellate courts have concluded correctly that § 216(b) does not require predominance of common questions. *See, e.g., O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585-86 (6th Cir. 2009); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) ("[t]he 'similarly situated' requirement . . 'is considerably less stringent than the requirement of Rule 23(b)(3) that common questions "predominate"'") (citation and alteration omitted). Tyson's sole challenge to the FLSA collective-action certification thus lacks merit.

E. Tyson's Rules Enabling Act And Due Process Challenges Fail

The Rules Enabling Act provides that Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Rules Enabling Act does not apply to the collective action, which is created by statute, not rule. And the class action did not alter substantive rights. It did not "lessen" respondents' burden of proof. Pet. Br. 37. The district court properly applied the *Mt. Clemens* standard, a *substantive* standard of proof triggered by Tyson's violation of recordkeeping requirements. Based on two lower-court cases—including a district court decision still on appeal—Tyson argues (at 36) that "[n]o court" would have allowed an individual employee to prove his own compensable time based on evidence submitted by other employees. Those cases do not establish any such rule; nor could they, as such a rule would contradict *Mt. Clemens*.[5]

Nor was Tyson deprived of its right to defend itself. Tyson argued the insufficiency of respondents' classwide proof by presenting evidence of actual time worked and contesting the reasonableness of respondents' inferential proof. *See Mt. Clemens*, 328 U.S. at 687-88. Tyson cross-examined Drs. Mericle and Fox, but decided for strategic reasons not to

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[5] Those cases are inapposite. *See Callahan v. City of Chicago*, 78 F. Supp. 3d 791, 823 (N.D. Ill. 2015) (finding that plaintiff had only "meager evidence" of minimum-wage violation), *appeal pending*, No. 15-1318 (7th Cir.); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88-89 (2d Cir. 2003) (workers on different building projects at different sites performing different jobs at different times for different pay).

present its own expert or to assert employee-specific defenses. *See supra* pp. 18-19.

Tyson repeatedly invokes *Wal-Mart*'s "trial by formula" mantra, but *Wal-Mart* addressed a starkly different problem. *Wal-Mart* disapproved extrapolation in a massive sex-discrimination class action in which plaintiffs sought to prove for all class members the subjective question underlying each plaintiff's claim—"why was I disfavored?," 131 S. Ct. at 2552—through a sample of class members. *Id.* at 2561. Nothing resembling that occurred here. In contrast to the myriad discretionary decisions in *Wal-Mart*, respondents were subjected to a common, plant-wide policy that systematically undercompensated them for compensable work under the FLSA and state law. Given Tyson's failure to keep accurate time records, *Mt. Clemens* permitted respondents to prove their hours based on an objective reasonable-approximation standard capable of classwide proof. Nothing in *Wal-Mart* overrides *Mt. Clemens*. Reading *Wal-Mart* to forbid the use of inferential proof under *Mt. Clemens*, a case interpreting the FLSA, in a class proceeding would violate *respondents*' rights under the Rules Enabling Act.

II. THAT SOME CLASS MEMBERS CANNOT PROVE DAMAGES DOES NOT DEFEAT CERTIFICATION OF A CLASS OR COLLECTIVE ACTION

The second question presented is "[w]hether a class action may be certified or maintained" when it contains uninjured members. Pet. Br. i. Tyson now correctly concedes the answer is yes: Article III, it acknowledges, "does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Pet. Br. 49. This Court's decisions compel the conclusion that neither Article III nor Rule 23 forbids certification of a class including members ultimately found to lack compensable damages.

Tyson now argues only that a court may not "*award damages* to class members who cannot prove injury." *Id.* at 46 (emphasis added). That argument falls outside the question presented, and the judgment fully satisfies Tyson's criteria anyway. Class members without compensable damages did not "contribute to the size of [the] damage award" and "cannot recover . . damages" under it. *Id.* at 49.

A. Neither Article III Nor Rule 23 Precludes Certifying A Class With Some Members Who Ultimately Do Not Prove Injury

1. This Court repeatedly has held that a "case or controversy" exists under Article III whenever one plaintiff has standing. *See, e.g., Horne v. Flores*, 557 U.S. 433, 446-47 (2009); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). That principle applies to class litigation, which, "like traditional joinder, leaves the parties' legal rights

and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality).

Although the Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices (as Tyson acknowledges, at 46) to create a justiciable controversy over her entitlement to redress, the controversy exists regardless of whether the *form* of redress is compensatory (damages) or preventive (injunctive relief). Standing principles apply to actions aimed at either "obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000). If a single "plaintiff demonstrate[s] standing . . for each *form* of relief sought," the court has jurisdiction to resolve the plaintiff's claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added; internal quotations omitted); *see generally* 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.15 (3d ed. 2008). Accordingly, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.); *accord In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306-07 (3d Cir. 1998); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010).

The presence of class members with no compensable damages poses no Article III problem.

The claims of hundreds of injured members undisputedly presented a justiciable case. Unlike the *merits* question of plaintiffs' ultimate proof of damages, standing addresses the power of federal courts to adjudicate a case or controversy—"whether on the case before a court .. the law confers the power to render a judgment or decree." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838). Because the purpose of the court's jurisdiction is to declare winners and losers, "[t]here may be jurisdiction and yet an absence of merits." *Gen. Inv. Co. v. New York Cent. R.R. Co.*, 271 U.S. 228, 230 (1926). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). *See generally Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Doe v. Chao*, 540 U.S. 614, 624-26 (2004).

If the Court held otherwise, every damages plaintiff—in individual and class-action cases—would have to prove her case to avoid a jurisdictional dismissal under Rule 12(b)(1). Moreover, if a plaintiff who did not show damages at trial lacked standing, the proper resolution would not be judgment in the defendant's favor but a jurisdictional dismissal without res judicata effect. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Such a novel rule, beneficial to neither plaintiffs nor defendants and wasteful of judicial resources, would contradict this Court's longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See Gen. Inv. Co.*, 271 U.S. at 230-31; *Bell*, 327 U.S. at 682; *see also Kohen*, 571 F.3d at 677 (Posner, J.) ("[W]hen a plaintiff loses a [damages] case [at trial] because he

cannot prove injury the suit is not dismissed for lack of jurisdiction.").

2. Likewise, neither Rule 23 nor the FLSA requires a showing that all class or collective-action members have compensable damages. Such a requirement would "put the cart before the horse" by conditioning certification on plaintiffs' "first establish[ing] that [they] will win the fray." *Amgen*, 133 S. Ct. at 1191. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 1191 (internal quotations and alteration omitted). Accordingly, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see also, e.g.*, *Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677.

Conditioning certification on proof all class members were injured would create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," but assessing class members' injuries at certification is often infeasible because their identities are unknown. *See, e.g.*, *Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677. Avoiding that difficulty by building injury into the class definition would run up against many courts' disapproval of "fail-safe" class definitions. *E.g.*, *Nexium*, 777 F.3d at 22. Moreover, because class

certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring decertification—rather than adverse merits decisions to class members without damages—if *any* plaintiffs were shown to be uninjured at any stage, even (as here) after trial. Years of the court's and parties' time would be wasted if just one such plaintiff were discovered. Equally troubling, because classes must be certifiable to be settled, *see Amchem*, 521 U.S. at 620, neither defendants nor plaintiffs could rely on across-the-board resolutions without identifying every class member and demonstrating that all were injured.

Limiting Rule 23 certification to classes where all members were injured would also undermine well-established rules governing other substantive causes of action. For example, in Title VII cases using pattern-or-practice proof—generally available *only* in class actions or government enforcement actions, *see Chin v. Port Auth.*, 685 F.3d 135, 148-50 (2d Cir. 2012)—a court first adjudicates whether a discriminatory practice exists and then holds individualized hearings on each class member's injury and entitlement to a remedy. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977). Limiting classes to plaintiffs who show injury would contradict *Franks*' holding that such a showing is not necessary to class certification, but "become[s] material" only at the remedial stage. 424 U.S. at 772. As *Teamsters* recognized, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief

was a victim of the employer's discriminatory policy." 431 U.S. at 360.

Holding that an FLSA collective action could proceed only if all members were injured would likewise conflict with Congress's choice of this procedural mechanism to redress violations of federal law. Opting in to a collective action is analogous to joining an ongoing action as an individual plaintiff. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259 n.35 (11th Cir. 2008). It would be anomalous for a collection of plaintiffs with valid claims to have their entire action dismissed because of the joinder of an additional plaintiff whose damages claim was unsuccessful. Such a result would also encourage gamesmanship: Employers could solicit uninjured workers to opt in as "poison-pill" plaintiffs to undo certification.

Finally, the tedious work of constantly weeding out uninjured members and the wasteful step of decertifying classes years after the fact if any members without damages are revealed is unnecessary to prevent uninjured class members from recovering. If uninjured members come to light, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; or (3) instructing the jury not to base any award of damages on uninjured individuals. Tyson waived the first two options, *see* Dkt. 212-1, and the court employed the third, JA481.

3. Tyson no longer disputes these points, acknowledging (at 49) that a class or collective action *may* include uninjured members. Having posited a circuit conflict in its petition and represented it

would advocate a negative answer to the question, Tyson has pulled the same bait-and-switch this Court saw in *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). There, as here, the petitioner "persuaded [the Court] to grant certiorari" and then "chose to rely on a different argument," *id.* at 1772, disavowing the position in its petition in favor of a fact-bound argument that assumed the opposite answer to the question from the one pressed in the petition. *See id.* Here, this Court should hold that a court may certify a class or collective action with members who lack compensable damages. Alternatively, as in *Sheehan*, this Court may choose to dismiss the writ as improvidently granted on the second question.

B. Tyson's Argument That The Courts Below Approved An Award Of Damages To Uninjured Persons Lacks Merit

Instead of addressing its second question, Tyson pivots to arguing that a court may not award damages to uninjured plaintiffs. Although Tyson presents the issue as one of Article III justiciability, it is no more than an uncontested truism about *substantive* law: A court may not award damages to a plaintiff who has none, class action or no. In arguing that the judgment did so, Tyson transforms the petition's challenge to the *certification* decision into a fact-bound claim that *the jury verdict* increased Tyson's liability because of, or awarded damages to, uninjured individuals. Tyson's argument is outside the question presented and rests on claims of error that Tyson invited below and lacks standing to assert. Should the Court choose to reach it, Tyson's new argument lacks merit because the

verdict did not award damages for uninjured plaintiffs.

1. Tyson's arguments rest largely on the verdict's award of an unallocated sum to the class. But Tyson lacks standing to complain about a potential allocation of the verdict that does not change its liability. *See, e.g.*, *Waisome v. Port Auth.*, 999 F.2d 711, 714-15 (2d Cir. 1993); *see generally Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015) (collecting cases rejecting challenges to intra-class damages allocations that did not change defendants' liability). "[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499).

Accepting Tyson's objections to the unallocated verdict would be especially inappropriate because Tyson invited that supposed error on multiple occasions. Tyson proposed a classwide verdict and opposed a bifurcated proceeding yielding individualized awards. JA8, 102-04, 111-15. And Tyson knew about the non-damaged individuals when it moved to decertify, but made no effort to exclude them from the class, opting for an all-or-nothing decertification demand. *See* Dkt. 212-1. Tyson received the verdict form it preferred—a single sum for the class—and cannot now complain it got what it requested.

2. In any event, the judgment does not award damages to, or on account of, uninjured people. The jury considered individualized breakdowns of the damages to which each class member was entitled, which specified those class members without

damages. *See supra* pp. 18-19. The court explicitly instructed the jury not to "award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid," JA471-72, and that "[a]ny employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages," JA481.

Juries are presumed to follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Moreover, one challenging a verdict must show that no reasonable person could have reached it. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). To the extent a jury verdict is unclear, courts adopt the interpretation consistent with the jury instructions, *see Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2009), reconciling inconsistencies "if at all possible," *Bauer v. Norris*, 713 F.2d 408, 413 n.8 (8th Cir. 1983) (internal quotations omitted), and resolving ambiguities "in favor of the jury's verdict," *Phenix Fed. Sav. & Loan Ass'n, F.A. v. Shearson Loeb Rhoades, Inc.*, 856 F.2d 1125, 1129 (8th Cir. 1988).

Tyson cannot overcome these presumptions. It offers no reason to believe the jury violated its instructions by awarding damages attributable to uninjured individuals, much less that no reasonable person could have reached the verdict.

Tyson's sole basis for assuming uninjured members will share in the unallocated award is the conjecture of one judge who dissented below. Pet. Br. 52. Nothing in the record supports that assertion, as the district court has not yet exercised its authority

to approve allocation of the verdict—a procedure used when a verdict does not specify how it is to be distributed. *See, e.g.*, *In re Urethane Antitrust Litig.*, 2013 WL 3879264, at *2-3 (D. Kan. 2013), *aff'd*, 768 F.3d 1245 (10th Cir. 2014), *pet. for cert. pending*, No. 14-1091 (filed Mar. 10, 2015); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 2011 WL 1808038, at *2 (D. Kan. 2011); *In re Exxon Valdez*, 1996 WL 384623, at *19 (D. Alaska 1996). Tyson has no basis for speculating that the court would allocate any part of the award to uninjured individuals.

Tyson suggests (at 53) that an allocation would raise due process or Seventh Amendment concerns by "reopen[ing] the judgment and reallocat[ing] the damages," but it offers no authority remotely on point. Approving an allocation would neither reopen the *judgment*, as Tyson's liability would remain unchanged, nor *re*allocate anything, as allocation of the verdict consistent with the jury instructions remains the district court's proper role.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RULE 29.6 STATEMENT

Tyson Foods, Inc. has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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INTRODUCTION

Plaintiffs persuaded the district court to certify a class of 3,334 Tyson employees even though there were significant differences in the amount of time employees spent on, and were paid for, donning and doffing activities, and hundreds worked no unpaid overtime. The lower courts allowed plaintiffs to ignore these differences and "prove" liability and damages with "common" evidence that presumed that *all* class members are identical to a fictional "average" employee. Unable to reconcile this approach with this Court's recent class action rulings, plaintiffs and their *amici* raise a series of misleading—and, in some instances, false—claims to stave off reversal.

Plaintiffs begin by claiming that Tyson's challenge to class certification is an improper attempt to benefit from record-keeping problems Tyson created by violating a 1996 injunction in *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993), *aff'd*, 38 F.3d 1123 (10th Cir. 1994). Br. 1. Plaintiffs did not raise this argument when opposing certiorari, and it is false. In fact, Tyson's K-Code policy here was consistent with the *Reich* court's interpretation of the FLSA and the terms on which the backpay claims were settled. The court there held that Tyson's predecessor, IBP, did *not* have to pay for donning and doffing standard protective equipment and sanitary clothing, or for associated walking between the locker room and work station. 38 F.3d at 1125-26.[1] And although the court

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[1] Plaintiffs also incorrectly assert (Br. 7 & n.1) that Tyson was "found liable" for violating the FLSA in *Guyton* v. *Tyson Foods, Inc.* They cite an order *denying summary judgment* to Tyson, but ignore that Tyson *prevailed at trial* on compensability and good-faith compliance with *Reich*, *see Guyton* v. *Tyson Foods*,

did hold that IBP had to pay for time spent donning, doffing, and cleaning the "unique" protective equipment, the government agreed that four minutes was sufficient compensation for those activities and settled the backpay claims on that basis. See *Alvarez* v. *IBP, Inc.*, 2001 WL 34897841, at *2 & n.3 (E.D. Wash. 2001) (discussing *Reich* litigation), *aff'd in part*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).

Here, consistent with *Reich* and Department of Labor guidance, Tyson paid four (or more) minutes of K-Code time to knife users for the "unique" equipment, and kept records of that K-Code time.[2] But Tyson did not record time spent on the remaining activities that *Reich* held *noncompensable*. Pet.App. 2a.

Plaintiffs also argue (again, for the first time) that Tyson waived its objections to class certification. These assertions are fiction. After plaintiffs sued to obtain larger K-Code payments for knife users and compensation for activities held noncompensable in *Reich*, Tyson "vigorously" resisted class certification "at every turn." Pet.App. 20a (Beam, J., dissenting).

Inc., 767 F.3d 754, 764 (8th Cir. 2014) (affirming verdict). Tyson also prevailed in *Lopez* v. *Tyson Foods, Inc.*, 690 F.3d 869 (8th Cir. 2012).

[2] Tyson's policy of recording K-Code time comports with guidance on the Department's website. *See* Dep't of Labor, *Field Operations Handbook* §31b01a (1996) (employers "may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities"); 29 C.F.R. §785.48(a) ("Time clocks are not required"). The unpublished Opinion Letter cited by plaintiffs (at 8) and the government (at 8 n.2) stating that meatpacking companies must record actual time spent on these activities was sent to the American Meat Institute, not Tyson. It was neither presented nor endorsed in *Reich*.

When they finally address the merits, plaintiffs misread *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Mt. Clemens* neither relieves an FLSA plaintiff of the burden of proving that he worked overtime for which he was not paid, nor creates a special rule allowing plaintiffs to prove liability and damages with evidence of a hypothetical average employee derived from a nonrepresentative sample. Moreover, this Court's decisions make clear that class certification cannot be premised on determining classwide liability and damages through a "Trial by Formula," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), or with damages models unmoored from the defendant's putative liability to individual class members, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). *Infra* §I.

Plaintiffs offer no substantive defense of the inclusion of uninjured people in the class. Instead, plaintiffs invoke waiver, ask the Court to dismiss the writ, and argue that Tyson lacks standing here. These smokescreens lack merit. Plaintiffs rely on them because the lower courts' refusal to decertify a class that indisputably contains hundreds of uninjured members is indefensible. *Infra* §II. The decision below should be reversed.

ARGUMENT

I. A RULE 23 CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED BASED ON STATISTICAL EVIDENCE THAT MASKS DIFFERENCES AMONG CLASS MEMBERS.

In defending the class certification, plaintiffs rely on two propositions: (1) district courts have discretion to determine that common questions "[o]utweigh" individual ones, Br. 27-32; and (2) *Mt. Clemens*

created a special rule to facilitate "classwide resolution" of FLSA claims by allowing employees to prove liability and damages with classwide averages, Br. 33-47. Neither is correct.

A. The "Predominance" And "Similarly Situated" Requirements Of Rule 23(b)(3) And The FLSA Require Claims That Are Sufficiently Cohesive To Justify Representative Adjudication.

Plaintiffs misunderstand Rule 23(b)(3)'s "predominance" requirement and the FLSA's "similarly situated" requirement. Predominance is *not* established by counting the common questions to see if they are "greater [in] quantity or importance" than the individual questions. Br. 27. Instead, a court must analyze "the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997), to decide whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation,'" *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196-97 (2013). See Tyson Br. 22-25.

Although Rule 23 may impose requirements on class actions that are not applicable to collective actions (cf. Br. 48), a court considering whether plaintiffs may sue on "behalf of" themselves "and other employees similarly situated" under the FLSA, 29 U.S.C. §216(b), must likewise decide whether the claims are sufficiently similar to warrant adjudication by representation (see Tyson Br. 25-27). Plaintiffs provide no other explanation of what that requirement could mean.[3]

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[3] *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001), the lead case cited by plaintiffs (at 48) and the

Plaintiffs suggest (Br. 29-32) that Tyson conceded below that the question of the compensability of the activities at issue predominates over individualized questions of injury and damages. Initially, plaintiffs waived this objection by not raising it when opposing certiorari. Sup. Ct. R. 15.2. In all events, this suggestion is false. Plaintiffs overlook Tyson's opposition to the motion for class certification, which expressly argued that "[i]ndividual issues will predominate" and "Plaintiffs' state law class is not appropriate under 23(b)(3)." Dkt. 45, at 13-15.

B. The Courts Below Erred In Certifying A Class On The Premise That Plaintiffs Could "Prove" Injury And Damages With Classwide Averages.

As this Court made clear in *Wal-Mart*, 131 S. Ct. at 2561, class certification based on the premise that plaintiffs will establish classwide liability and damages with evidence of a hypothetical "average" plaintiff violates the Rules Enabling Act because it creates the requisite commonality for trial by masking individual differences that are essential to an accurate determination of class members' claims. See Tyson Br. 34-40, 42-44. It also violates due process by depriving defendants of their right to defend against individual claims. *Wal-Mart*, 131 S. Ct. at 2561.

Plaintiffs seek to distinguish this Court's cases on the theory that *Mt. Clemens* created a bespoke rule that "facilitate[s] class certification" in FLSA cases by obviating the need for any evidence that an employee actually worked overtime for which he was not

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United States (at 30), confirms that the analysis must focus on whether plaintiffs' claims and defendant's defenses fairly can be adjudicated in a representative action. *See* Tyson Br. 26 n.3.

properly compensated—*i.e.*, any evidence of liability. Br. 35. According to plaintiffs, *Mt. Clemens* allows a plaintiff to prove both liability and damages by "reasonable approximation," *id.*, a standard that may be satisfied with evidence of the hypothetical "average" employee even if that average does not remotely reflect the plaintiff's unpaid time, *id.* at 34-45. Based on this reading of *Mt. Clemens*, plaintiffs argue that class certification did not alter any rights or deprive Tyson of the ability to litigate any defenses. *Id.* at 49-50. Plaintiffs are wrong.

1. *Mt. Clemens* does not permit use of averages to mask differences that can determine liability and damages.

To defend their claim that plaintiffs can prove both liability and damages by "reasonable approximation," plaintiffs and the government argue that requiring proof that each class member actually performed unpaid overtime "would contradict the central teaching" of *Mt. Clemens*, because it does not give "[d]ue regard" to the employer's failure to keep accurate records, U.S. Br. 27 (alteration in original), and instead rewards that failure, Br. 36.

Mt. Clemens does not hold, however, that the remedy for the employer's failure to keep records is to allow the employee to prevail by raising a mere "just and reasonable inference" that he performed unpaid overtime. It held that the employee must "*prov*[*e*] that he has *in fact performed work* for which he was improperly compensated," but he need only "produc[e] sufficient evidence to show the *amount and extent* of that work as a matter of just and reasonable inference." 328 U.S. at 687 (emphases added). If the employee does both, the "burden then shifts to the employer" to "negative the reasonableness" of the employee's inference or "come forward with evidence

of the precise amount of work performed." *Id.* at 687-88.

Significantly, the Court drew this two-pronged fact-of-injury/estimate-of-damages test from *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). See *Mt. Clemens*, 328 U.S. at 688. *Story Parchment* recognized that

> there is a clear distinction between the measure of proof necessary to establish *the fact* that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix *the amount*. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

282 U.S. at 562 (emphasis added).

Plaintiffs and the government nevertheless assert that the Court necessarily allowed plaintiffs to prove *liability* to 300 workers as a matter of "just and reasonable inference" from the "representative" testimony of the eight employees who testified in *Mt. Clemens*. Br. 34-38; U.S. Br. 17, 26-28. The opinion nowhere states, however, that the testimony of the eight employees was sufficiently "representative" to establish liability and damages for all 300, much less that liability and damages could be established based on their *average*. The Court held only that certain activities were compensable, and that an employee could "show the amount and extent" of unpaid work "as a matter of just and reasonable inference," after he proved (as the Court was "*assuming*") that "he has performed work and has not been paid in

accordance with the statute."[4] *Mt. Clemens*, 328 U.S. at 687-88, 694 (emphasis added).

Nor is it true (U.S. Br. 27) that lower courts have "consistently held" that *Mt. Clemens* permits plaintiffs to prove both liability and damages as a matter of just and reasonable inference. To the contrary, as the Sixth Circuit explained, "*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that an FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are." *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 602 (6th Cir. 2009); see also *Carmody* v. *Kan. City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013); *Kuebel* v. *Black & Decker Inc.*, 643 F.3d 352, 364-65 (2d Cir. 2011); *Brown* v. *Family Dollar Stores of Ind., LP*, 534 F.3d 593, 596 (7th Cir. 2008).[5]

Properly understood, therefore, *Mt. Clemens* did not "facilitate[] class certification"—an innovation that would not be adopted by Rule 23 for another 20 years—by allowing plaintiffs to show the fact of unpaid overtime by "reasonable classwide approximations."[6] Br. 34-35. Even though *Mt.*

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[4] Indeed, the complaint alleged that the employees worked more than 40 hours per week, not including time for preliminary activities or walking to the work station. *See Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 461-62 (6th Cir. 1945).

[5] In fact, the California Supreme Court has rejected the claim that *Mt. Clemens* permits liability to be proven with statistical sampling. *See Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 41 (2014).

[6] Nor is it necessary to lower the burden of proof of liability to enable effective enforcement that will deter wage-and-hour law violations. *See, e.g.*, Illinois *et al.* Amicus Br. 26-32. An employer that violates the FLSA is liable not only for unpaid wages, but

Clemens was a collective action, this Court defined the plaintiff's burden of proof in *individual*, not classwide terms. See *Mt. Clemens*, 328 U.S. at 687 ("an employee" must prove "that *he* has in fact performed work for which *he* was improperly compensated") (emphases added). Because class certification cannot "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b), plaintiffs' burden in a class action is the same.

2. Class certification in this case was inconsistent with *Mt. Clemens*.

Mericle's averages do not provide a basis for proving either the fact of injury (*i.e.*, that individual plaintiffs worked uncompensated overtime) or a just and reasonable approximation of damages. It is undisputed that Mericle's averages masked wide variations in time. Compare, *e.g.*, J.A.142 (time spent donning equipment pre-shift at locker in Fabrication ranged from .583 to 10.333 minutes), with J.A.123 (Mericle's average included 4.56 minutes of time donning equipment pre-shift at locker in Fabrication). And the averages are inflated by activities (such as washing equipment) that many employees did not perform. Tyson Br. 34. Fox's calculations showed that those differences frequently were *determinative* of liability and damages.[7]

Critically, therefore, the government is wrong in asserting that all class members "performed some unpaid work, even setting aside respondents' proof of

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also for liquidated damages, reasonable attorneys' fees, and the costs of the action. 29 U.S.C. §216(b).

[7] *Compare* J.A.139, *with* J.A.141 (showing that if one assumes that all class members spent 15 minutes/day on donning/doffing instead of 18-21 minutes, there are 110 fewer injured class members and damages are reduced by more than $1.78 million).

the amount of time required for pre- and post-shift activities," U.S. Br. 28. Knife users hired after February 4, 2007, when Tyson added "walking" time to the K-Code payment, were fully paid unless their compensable time for donning, doffing, washing and walking is longer than the four to eight minutes Tyson paid. Non-knife users who worked before February 4, 2007 were fully paid unless their compensable time for donning, doffing, and walking is more than the four minutes Tyson paid.[8] Furthermore, plaintiffs' damages expert, Dr. Fox, found that over 200 class members worked *no unpaid overtime* even if Mericle's averages are added to their timesheets, and she admitted that if the actual time were lower than Mericle calculated, the number of uninjured class members would rise. J.A.414-415, 424-425. The jury awarded less than half of what plaintiffs requested, "likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." Pet. App. 22a (Beam, J., dissenting).

Contrary to plaintiffs' claim, the alternative to Mericle's improper averages is not "hyper-precision." Br. 42. Tyson does not argue that it would be improper to infer that a worker "who spent 18 minutes donning and doffing on Monday spent the same amount of time on Tuesday." *Id.* What is improper is asking this Court to infer that 3,334 employees who performed hundreds of different jobs with varying combinations of protective equipment

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[8] Plaintiffs' assertion that Tyson's current policy of paying at least 20 minutes of K-Code time was based on a new time study (Br. 11) is unsupported by the record (because the court *granted* Tyson's motion in limine), Dkt. 257, at 3, and is also untrue. Tyson made the change as part of a restructuring of the work day, not because of a new time study.

and washing duties each spent *exactly the same amount of time* on donning, doffing and washing activities. And they claim that inference is reasonable even though their own expert admitted it is not. J.A.387 (Mericle conceding there were "different [times] for every single person [his] team measured").

Recognizing the inadequacies of Mericle's averages would not resurrect "the stringent standard of proof rejected in *Mt. Clemens* itself." U.S. Br. 24. As the *Mt. Clemens* dissent emphasized, the Court *rejected* the "formula of compensation" developed by the district court because it was "not in accordance with the findings of the master." 328 U.S. at 695 (Burton, J., dissenting). Under that formula, the district court had awarded damages for the time listed on the time clock records minus a fixed number of minutes it thought were sufficient for most employees to clock in and walk to their work stations. *Anderson* v. *Mt. Clemens Pottery Co.*, 60 F. Supp. 146, 149-150 (E.D. Mich. 1943). The court of appeals deemed that formula "arbitrary" and held that damages could not be based on "conjecture" or "a mere estimated average of overtime worked." *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 465 (6th Cir. 1945). This Court plainly thought the Sixth Circuit had required more certainty about the amount of damages than was appropriate. But the Court's refusal to affirm a recovery based on a formula that *conflicted* with the evidence of the time the employees actually worked dispels any suggestion that plaintiffs can use averages that mask material differences among employees to prove liability or provide a just and reasonable inference of damages.

Here, Mericle's averages necessarily conferred "a windfall" on some class members and "undercompensate[d]" others. *Espenscheid* v.

DirectSat USA, LLC, 705 F.3d 770, 774 (7th Cir. 2013). Because the FLSA "was designed to give specific minimum protections to *individual* workers," not "to promote their interests *collectively*." *Barrentine* v. *Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), the FLSA cannot be interpreted to sanction that result. Thus, *Mt. Clemens* does not magically make plaintiffs' burden to prove injury and damages disappear.

3. Use of statistical averages violated the Rules Enabling Act and the Due Process Clause.

Even assuming that Mericle's averages could satisfy plaintiffs' burden of both proving the fact of unpaid overtime and showing a just and reasonable inference of the amount of damages, class certification was still improper: it undermined Tyson's ability to rebut plaintiffs' showing and defend against individual claims. Plaintiffs and their *amici* respond with three meritless arguments.

The Presumption Defense. Citing the "fraud-on-the-market" presumption established in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), plaintiffs claim that *Mt. Clemens* likewise allows a presumption that an average is a reasonable approximation of the unpaid overtime of each class member without the need for individualized inquiry. See Br. 35; U.S. Br. 16-17. Even apart from the fact that *Mt. Clemens* establishes no such presumption, *supra* pp. 6-9, this analogy is flawed. Tyson rebutted any such presumption by showing that Mericle's averages were *not* a reasonable approximation of the unpaid work of any class member because they were based on employees who performed different jobs and wore different protective equipment that took different amounts of time to don, doff, and clean. See Tyson

Br. 10-12, 29-34; *Espenschied*, 705 F.3d at 775 ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample"); *Marshall* v. *Truman Arnold Dist. Co.*, 640 F.2d 906, 911 (8th Cir. 1981) (Secretary cannot obtain damages for nontestifying employees based on projections of unpaid time the defendant rebutted as to the employees who testified).

At a minimum, *Mt. Clemens* and due process allow an employer to rebut an employee's inferential proof of damages with "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence," 328 U.S. at 687-88. And a presumption "should not preclude direct evidence when such evidence is available." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2415 (2014). Just as class certification in a securities fraud action must be denied when the defendant rebuts the factual basis for the presumption of fraud on the market, *id.* at 2415-16, class certification must be rejected in an FLSA case when the defendant rebuts the reasonableness of the inferences from plaintiffs' purported common proof of the amount of unpaid work.

It is no response to say that the jury found Mericle's averages sufficient to justify an award of classwide damages. U.S. Br. 34. Whether an expert model is capable of establishing classwide liability and damages is a question the court must resolve before class certification, not a "merits" question for the jury. *Comcast*, 133 S. Ct. at 1433 & n.5. The court of appeals in *Comcast* affirmed class certification without deciding what it thought was the "'merits'" question of whether the methodology in plaintiffs' damages model was "a just and reasonable inference

or speculative." *Id.* at 1433. This Court reversed, saying that such "reasoning flatly contradicts [the] cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Id.* "Under that logic," the Court explained, "at the class certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Comcast's reasoning controls here. Once Tyson showed that the Mericle time study neither proved that any class members worked unpaid overtime nor supported a reasonable inference of the unpaid overtime of each class member, the class should have been decertified. Without common proof of injury and damages, Rule 23(b)(3) cannot authorize treating 3,334 employees as a class.

Waiver Objections. Plaintiffs and their *amici* argue that Tyson has only itself to blame for not asserting its defenses because Tyson (1) opposed plaintiffs' request to bifurcate the proceedings, Br. 14, 46; (2) "made no effort to adduce employee-specific rebuttal proof" at trial, *Id.* at 46; and (3) failed to propose subdividing the class and offering its own study, U.S. Br. 21. These arguments are groundless.

In opposing certiorari, plaintiffs failed to make any waiver argument based on Tyson's opposition to bifurcation, thus waiving that objection. Sup. Ct. R. 15.2. Moreover, plaintiffs *abandoned* the request for bifurcation in the revised proposed pretrial order, which the court adopted. Dkt.229, at 4, 6-7. But even aside from these procedural defects, plaintiffs' proposal would not have avoided the "Trial by Formula" to which Tyson objected.

Plaintiffs proposed to have a "liability phase" in which the jury would use Mericle's average time study to decide "the number of minutes it takes to perform the contested activities, and the number of minutes that have not been paid." J.A.112-113. Those averages would then be mechanically applied to each class member's time sheets to calculate damages. *Id.* at 113. Tyson properly objected that "each Plaintiff presents individualized circumstances," and "[t]here is no common evidence that supports classwide liability and does not vary from individual to individual." *Id.* at 115. For that reason (and because it was filed late), plaintiffs' proposed bifurcation would have been prejudicial to Tyson and a waste of resources. *Id.*

Tyson also moved to decertify the class prior to trial, arguing that plaintiffs' proposal to prove classwide liability and damages with Mericle's time study and Fox's damages calculations was an impermissible "Trial by Formula" barred by *Wal-Mart*. See Tyson Br. 8. When plaintiffs used Mericle's time study and Fox's damages calculations as their only classwide proof, Tyson renewed its objection at the close of plaintiffs' case and after the jury's verdict. *Id.* at 14-15. Those actions fully preserved Tyson's objection.

Tyson had no duty to press the point further by seeking to call thousands of class members and asking the jury to make individualized findings for each one. Doing so would have been inconsistent with the foundational premise on which the court denied the decertification motion, Tyson Br. 37-38, and the court's expectation that the parties would work to "arriv[e] at a manageable number of witnesses to be called at trial," Dkt. 180, at 4.

Nor was Tyson obliged to "present[] a study using a different methodology" that divided the class into "more granular categories." U.S. Br. 21. The class consists of 3,334 people who did 420 jobs with various combinations of required and optional equipment that took different amounts of time to don, doff, and clean, and who were paid varying amounts of K-Code time. See Tyson Br. 4-6, 10-14, 29-35; J.A.126-138. Tyson defended the class claims that the district court certified. It had no obligation to defend the case as if it contained numerous subclasses defined along unspecified lines.

If plaintiffs thought more "granular" categories were possible, they should have proposed them as a solution to the deficiencies raised in Tyson's repeated objections to class certification. Tyson is not responsible for plaintiffs' litigation choices. It is *plaintiffs* who must demonstrate compliance with Rule 23, *Comcast*, 133 S. Ct. at 1432, at every stage of the litigation, including "at trial," *Wal-Mart*, 131 S. Ct. at 2552 n.6. Plaintiffs did not do that here.

The Post Hoc Manageability Defense. Finally, plaintiffs argue that the trial confirmed that common questions predominated (Br. 46-47; U.S. Br. 18) and that plaintiffs' claims were "'susceptible of class-wide proof" (U.S. Br. 18 (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1259 (10th Cir. 2014), *petition for cert. pending*, No. 14-1091 (filed Mar. 9, 2015)). This argument begs the question. When courts allow plaintiffs to sweep aside substantial individual differences with evidence of a hypothetical "average" plaintiff, their claims become "capable of class-wide proof." U.S. Br. 18. Conducting 3,334 coin flips would be manageable too, but the fundamental point is that Rule 23 cannot "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b). It is no answer

that rights-abridging shortcuts made class-wide resolution possible.

II. A RULE 23(B)(3) CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED OR MAINTAINED IF IT CONTAINS UNINJURED CLASS MEMBERS WHO CANNOT BE CULLED PRIOR TO JUDGMENT.

A. Federal Courts Have No Authority To Compensate Uninjured Persons.

Plaintiffs do not dispute that, to have Article III standing, a plaintiff must show that he suffered an "injury in fact" that is fairly traceable to the defendant and likely to be redressed by a favorable decision from the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). They nevertheless claim that, when multiple plaintiffs join together in a class action, Article III is satisfied as long as a single class member can make that showing. Br. 52. That argument is fundamentally at odds with this Court's insistence that "Art[icle] III judicial power exists only to redress or otherwise protect against injury *to the complaining party*." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Here, the "complaining party" is *every* opt-in plaintiff and class member who, through the procedural device of a class action, join "their separate claims against the same defendants" for adjudication "at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a species of joinder); see also *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1530 (2013) (employees "become parties" to a collective action if they file "written consent").

The fact that a court may enjoin unlawful action as long as a single plaintiff has standing (Br. 51-52) does not mean that it can award damages to uninjured class members. In the former situation, the court properly enters injunctive relief to redress the plaintiffs' injury even though it may incidentally benefit individuals who would not have standing. But that rationale does not justify an award of damages to a class with uninjured members. A court does not acquire the authority to award damages to uninjured people simply because they are wrongfully included in a class with injured people.

The result is the same even if, as plaintiffs claim (Br. 53), the presence of uninjured class members is viewed as a "merits" question rather than a standing question. The FLSA provides a cause of action for employees to recover "unpaid overtime compensation" from their employer. 29 U.S.C. §216(b). Employees who have no unpaid overtime have no cause of action and cannot be joined in a class action or collective action with others who do.

Plaintiffs may litigate on behalf of a class only if they can "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. Thus, where a defendant demonstrates (or, as here, the plaintiffs' expert concedes) that the class includes uninjured individuals, class certification is improper absent proof—not offered here—that there is a mechanism that ensures that uninjured persons will not recover damages.

Plaintiffs argue that the Court should dismiss the second question presented because Tyson has "pulled ... a bait-and-switch" and failed to advocate "a negative answer to the question." Br. 56-57. That is nonsense. Tyson advocates a negative answer to the question whether a class action or collective action

"may be certified or maintained" when it "contains hundreds of members who were not injured and have no legal right to any damages," Pet. (i). It explained (Tyson Br. 51-54) how the lower courts erred in allowing plaintiffs to maintain the class action and proceed to judgment after their own expert admitted there were hundreds of uninjured members. Cf. Pet. 29-30 (making similar argument).

The fact that Tyson gave a qualified negative answer ("no, unless") is not a concession that the position advocated by plaintiffs and adopted by the lower courts is correct because they did not satisfy the "unless." The parties' briefing in this Court illustrates the vast gulf between their respective positions. Citing cases like *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), and *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), plaintiffs assert (Br. 54-56) that it is often infeasible for plaintiffs to prove, at the class certification stage, that all class members were injured, and the possibility that some class members may later be found to be uninjured should not preclude class certification because the court can deal with that problem later. Tyson anticipated this argument, criticized *Kohen* (at 46-48), and explained (at 49-51) that *Nexium*'s approach is "seriously flawed and does not provide adequate protections" to ensure that courts not "exceed their constitutional power to remedy injuries."

Indeed, Tyson's fundamental point—confirmed by plaintiffs' submission here—is that plaintiffs and many lower courts too easily assume that the problem of uninjured class members can be resolved at some later time, and that reliance on such an assumption is impermissible. The rigorous culling

requirement that Tyson advocates—and that Article III demands—would change the law in many circuits.

Petitioners may have anticipated (or hoped) that Tyson would criticize *Kohen* and *Nexium* on different grounds, or that it would stake out a more absolutist position, arguing that a single uninjured plaintiff precludes class certification in all circumstances. But Tyson was entitled to "make any argument in support of [its Article III] claim." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). This Court should resolve the second question presented to prevent lower courts from continuing to certify class actions when plaintiffs fail to prove that uninjured members will not recover damages.

B. The Lower Courts' Refusal To Decertify The Class Violated The Foregoing Requirements.

Plaintiffs cannot justify the lower courts' refusal to decertify the class after it became clear that there were numerous uninjured class members.

Plaintiffs first claim that Tyson is really challenging the classwide jury verdict, not class certification, and a challenge to the verdict is "outside the question presented and rests on claims of error that Tyson invited below and lacks standing to assert." Br. 57-58. These diversionary tactics are meritless.

Tyson *is* challenging the refusal to decertify the class because it allowed plaintiffs to use the class action device to obtain damages for those with no injury and violated Article III limitations on the court's authority to award relief. Tyson Br. 49-51. Tyson made the same argument in the Petition (at 29-30), as plaintiffs acknowledged (BIO 19).

Plaintiffs are wrong to suggest (at 58) that inclusion of uninjured persons only implicates the rights of class members. It also affects Tyson's rights because payment of damages to uninjured class members would reduce the damages payable to injured class members, who may then claim they are not bound by the judgment. *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013). A defendant has standing to assert arguments concerning the "rights" and "interests" of class members "to vindicate its own interests" in having the entire class be bound by the judgment. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804-05 (1985). In all events, the arguments Tyson has raised go to the Court's jurisdiction to grant relief to uninjured parties and cannot be swept aside as none of Tyson's business.

As discussed, *supra* pp. 14-15, Tyson did not waive its opposition to the inclusion of uninjured class members by opposing plaintiffs' proposal to bifurcate liability and damages, or by proposing a classwide verdict. And Tyson did not invite the erroneous inclusion of injured class members. Tyson vigorously opposed class certification and had no duty to propose a more limited class definition that would exclude the uninjured class members. Br. 58. It is not clear that could be done, and, in any event, defining a proper class is *plaintiffs'* responsibility. *Supra* p. 16.

Nor can plaintiffs avoid the problem by claiming that the judgment does not award damages to uninjured people. Br. 58-59. That claim is based on speculation that the district court will not "allocate any part of the award to uninjured members." *Id.* at 60. Notably, plaintiffs are silent as to how the court should allocate the award or how it would know that the allocation does not compensate class members or opt-in plaintiffs the jury found to be uninjured.

Indeed, plaintiffs' inability to do so vividly illustrates the Article III problems that arise when courts improperly assume they can kick the problem of uninjured class members down the road in the hopes that some as-yet-unknown solution will present itself.

Plaintiffs dismiss as unsupported (Br. 60) Tyson's point that allocating the award would violate the Seventh Amendment. But in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), this Court held that a court may affirm a jury verdict on liability and order a retrial limited to damages only if the damages issue "is so distinct and separable" that the jury on remand would not have to reconsider any fact found by the jury that determined liability. *Id.* at 499-50. Because it was "impossible" to tell from the record "precisely what" were the terms of the contract found by the jury, and because "the jury cannot fix the amount of damages unless also advised of the terms of the contract," the Seventh Amendment required a new trial on liability and damages. *Id.* So too here, the verdict "contains no discernible guidelines sufficient to establish the individual damages due the limited number of members of the certified class with provable damages." Pet.App. 126a (Beam, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' suit seeking unpaid overtime on behalf of employees at a meat-processing plant was properly maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) and a collective action under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, where the compensability of the disputed activities turned on common questions of law and fact and where respondents established the extent of the employees' unpaid work on a class-wide basis by using the burden-shifting framework set forth in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a Rule 23(b)(3) class action or an FLSA collective action may be certified or maintained when the class members or collective-action plaintiffs include individuals who may ultimately be shown to have no entitlement to recover damages.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Secretary of Labor administers the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, by, *inter alia*, bringing enforcement actions to recover unpaid wages for employees. 29 U.S.C. 204, 216(c), 217. Private collective actions under 29 U.S.C. 216(b) are an essential supplement to the Secretary's enforcement. Such actions also supplement enforcement of the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See 29 U.S.C. 216(b), 626(b). The government similarly relies on class actions under Federal Rule of Civil Procedure 23(b)(3) to supplement its enforcement of other statutes. And the Unit-

ed States is a potential defendant in both class and collective actions.

STATUTORY PROVISIONS, REGULATIONS, AND RULE INVOLVED

Pertinent statutory provisions, regulations, and provisions of Federal Rule of Civil Procedure 23 are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

A. The Fair Labor Standards Act and *Mt. Clemens*

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires employers to pay a minimum wage for all hours worked and an overtime rate of one and one-half times an employee's regular wage for work in excess of 40 hours in a workweek. 29 U.S.C. 206, 207. This Court has long held that "the statutory workweek" ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25-26 (2005) (citation omitted).

Congress responded to that broad interpretation by enacting the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 251 *et seq.* The Portal Act did not alter "this Court's earlier descriptions of the terms 'work' and 'workweek,'" but it created "express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity." *Alvarez*, 546 U.S. at 28 (quoting 29 U.S.C. 254(a)). Those exceptions apply only "prior to the time on any particular workday at which [an] employee commences, or subsequent to the time on any particular workday at

which he ceases, [his] principal activity or activities." 29 U.S.C. 254(a). Accordingly, the compensable workday generally encompasses "the period between the commencement and completion" of an employee's principal activities. 29 C.F.R. 790.6(b); see *Alvarez*, 546 U.S. at 28-29.

The term "principal activities" includes "all activities which are an 'integral and indispensable part of the principal activities'" a worker is employed to perform. *Alvarez*, 546 U.S. at 29-30 (citation omitted). For example, "the donning and doffing of specialized protective gear" by factory workers is a compensable principal activity if it is an integral and indispensable part of their job. *Id.* at 30. And "any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity"—including time spent walking between a locker room and the production line after donning and before doffing protective gear—is therefore "covered by the FLSA." *Id.* at 37.

2. The Secretary of Labor is authorized to sue to compel an employer to pay wages owed under the FLSA. 29 U.S.C. 216(c), 217. The FLSA also authorizes "any one or more employees" to bring an action—known as a "collective action"—to recover unpaid wages "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b); see *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1527 (2013). Such actions are "fundamentally different" from class actions under Federal Rule of Civil Procedure 23. *Id.* at 1529. Among other things, a collective action binds only employees who opt in by filing written consents, and those employees become "party plaintiff[s]." 29 U.S.C. 216(b).

Courts hearing collective actions typically follow a two-step joinder process commonly—albeit somewhat imprecisely—called "certification." *Comer* v. *Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-547 (6th Cir. 2006); see *Genesis Healthcare*, 133 S. Ct. at 1527 n.1. First, if the named plaintiffs make a preliminary showing that other employees are "similarly situated," the court may "conditionally certify" the collective action—*i.e.*, allow the plaintiffs to take discovery of the names and addresses of potential opt-in plaintiffs and notify them of the action. *Genesis Healthcare*, 133 S. Ct. at 1530. Second, after the filing of opt-in consents and further discovery, the employer may move to "decertify" the collective action in whole or in part. *Comer*, 454 F.3d at 546-547, 549. The court must then determine whether the challenged opt-in plaintiffs are, in fact, "similarly situated" to the named plaintiffs. *Id.* at 549.

3. To facilitate enforcement of the FLSA, Congress mandated that every covered employer keep "records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him" in accordance with regulations issued by the Secretary. 29 U.S.C. 211(c). Those regulations require employers to record each employee's "[h]ours worked each workday," "total hours worked each workweek," and regular and overtime pay. 29 C.F.R. 516.2(6)-(9). If an employer has kept those records, the Secretary or employee plaintiffs can "easily" establish the extent of any uncompensated work in an action to recover backpay. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (*Mt. Clemens*). But "where the employer's

records are inaccurate or inadequate," the task becomes far more difficult. *Ibid.*

This Court addressed that problem in *Mt. Clemens*, which was a collective action brought by approximately 300 factory workers seeking to recover overtime for pre-shift activities, including time spent walking to their workstations, putting on gear, and preparing equipment. *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 461-464 (6th Cir. 1945). Because the employer had not recorded the time spent on those pre-shift tasks, the workers relied on testimony from eight employees. *Id.* at 462. The court of appeals found that evidence inadequate, concluding that "the burden rested on each of the plaintiffs to prove by a preponderance of the evidence that he did not receive the wages that he was entitled to receive under the [FLSA], and to show by evidence, not resting upon conjecture, the extent of overtime worked." *Id.* at 465. "It does not suffice," the court held, "for the employee to base his right to recovery on a mere estimated average of overtime worked." *Ibid.*

This Court disagreed, holding that the court of appeals had imposed "an improper standard of proof" that would have had "the practical effect of impairing many of the benefits of the [FLSA]." *Mt. Clemens*, 328 U.S. at 686. The Court reasoned that employees should not be penalized for their employer's "failure to keep proper records in conformity with his statutory duty," and that such a failure instead calls for a burden-shifting framework. *Id.* at 687.

Under that framework, employees carry their burden if they show that they "in fact performed work for which [they were] improperly compensated and if [they] produce[] sufficient evidence to show the

amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. The burden then shifts to the employer, who must "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference" from the employees' proof. *Id.* at 687-688. If the employer fails to do so, "the court may then award damages to the employee[s], even though the result be only approximate." *Id.* at 688. The Court made clear that "even where the lack of accurate records grows out of a bona fide mistake" about the compensability of the unrecorded work, "the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Ibid.*

In *Mt. Clemens* itself, the Court determined that the workers were entitled to be paid for time spent walking to their workstations and for any preliminary activities performed there, subject to a de minimis rule. 328 U.S. at 690-693.[1] The Court further held that the workers could not "be barred from their statutory rights" on the ground that "the amount of time taken up by the activities * * * had not been proved by [them] with any degree of reliability or accuracy." *Id.* at 693. The Court remanded to the district court to determine the amount of compensable time, reiterating that "[u]nless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.* at 693-694.

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[1] That aspect of *Mt. Clemens* was abrogated in part by the Portal Act. *Alvarez*, 546 U.S. at 28.

For nearly 70 years, the *Mt. Clemens* framework has been essential to effective enforcement of the FLSA because it allows the Secretary or private plaintiffs to establish the amount of unrecorded work performed by a group of employees using "representative testimony from a sampling of [the] affected employees." Laurie E. Leader, *Wages and Hours: Law and Practice* § 9.03[2], at 9-32 (2015) (*Wages and Hours*). Although such proof necessarily relies on approximations, "[i]t is firmly established [that] where an employer has not kept adequate records," employees "will not be denied a recovery of back wages on the ground that their uncompensated work cannot be precisely determined." *Brock* v. *Norman's Country Mkt., Inc.*, 835 F.2d 823, 828 (11th Cir.), cert. denied, 487 U.S. 1205 (1988).

B. The Present Controversy

1. Petitioner operates a pork-processing plant in Storm Lake, Iowa. Pet. App. 45a. Most workers in the plant use knives or other cutting tools, and petitioner requires all employees to wear protective and sanitary gear. *Id.* at 26a, 46a-47a. The equipment is provided by petitioner and stored in lockers at the plant. J.A. 118-119. Employees generally don their equipment in locker rooms before walking to their stations on the production line, and they are required to be fully dressed before their work on the line begins. Pet. App. 26a, 47a; J.A. 120.

Petitioner pays its production employees on a system known as "gang time." Pet. App. 2a, 26a. Pay begins when the first hog of the day arrives at an employee's workstation and ends when the last hog leaves. J.A. 171. During the years at issue in this case, petitioner also paid some employees for a few

additional minutes per day—known as "K-code" time—intended to estimate the time required for some (but not all) required pre- and post-shift activities. J.A. 121-122. Before 2007, petitioner paid four minutes of K-code time to all production employees to cover the estimated time required to don and doff certain equipment worn to protect against knife cuts. *Ibid.*[2] In 2007, after this Court's decision in *Alvarez*, petitioner began paying knife-wielding employees for the time spent walking between the locker room and the production line. *Ibid.* Petitioner also revised the amount of donning and doffing time attributed to those employees, resulting in total K-code payments of between 4 and 8 minutes per day, depending on the

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[2] Petitioner began making those payments in 1998, following two enforcement actions brought by the Department of Labor against petitioner's predecessor, IBP. *Acosta* v. *Tyson Foods, Inc.*, No. 08-cv-86, 2013 WL 7849473, at *9-*11 (D. Neb. May 31, 2013), rev'd, No. 14-1582, 2015 WL 5023643 (8th Cir. Aug. 26, 2015). The first action resulted in an injunction requiring IBP to comply with the FLSA's overtime and recordkeeping requirements with respect to pre- and post-shift work at Storm Lake and other facilities. *Id.* at *10. In settling a second enforcement action brought to remedy IBP's violation of the injunction, the Department agreed that IBP could pay for the donning and doffing held to be compensable in the original action by paying four minutes of K-code time, but only "until such time as the Department announces its position with respect to recordkeeping in the industry." *Id.* at *11 (emphasis and citation omitted). In 2001—well before the class period in this case—the Department clarified that meatpacking companies may not rely on such estimates and must instead "record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing, or gear." Dep't of Labor, Op. Letter, 2001 WL 58864, at *2 (Jan. 15, 2001), withdrawn in part on other grounds, 2002 WL 33941766 (June 6, 2002).

position. *Ibid.* At the same time, petitioner ceased paying K-code time to non-knife-wielding employees, taking the position that donning and doffing the standard sanitary and protective equipment those employees wore was not compensable. *Ibid.* At no point did petitioner record the actual amount of time workers devoted to any of their pre- and post-shift activities. Pet. App. 2a; J.A. 175.

2. Respondents are current and former production employees at the Storm Lake plant. They filed this action under the FLSA, alleging that petitioner unlawfully failed to pay overtime for pre- and post-shift activities and for donning and doffing during meal breaks. Pet. App. 1a, 5a. Respondents also brought a parallel claim under an Iowa statute that provides a cause of action to collect wages owed under another source of law—here, the FLSA. *Id.* at 56a; see Iowa Code Ann. §§ 91A.3, 91A.4 (West 2007). Respondents moved to certify their FLSA claim as a collective action and to certify the parallel Iowa law claim as a class action under Federal Rule of Civil Procedure 23(b)(3).

a. The district court conditionally certified a collective action and certified a class action, holding that the requirements of Section 216(b) and Rule 23 were satisfied. Pet. App. 41a-113a. The court rejected petitioner's contention that differences in the equipment worn by employees precluded certification for lack of similarity and commonality, finding that "there are far more factual similarities than dissimilarities" among the collective- and class-action members. *Id.* at 88a-89a; see *id.* at 98a-99a. The court also concluded under Rule 23(b)(3) that questions common to the class predominated over questions affecting only individual

members, noting that "common evidence that [petitioner's] compensation system cannot account for even the basic or standard [equipment] employees need to don, doff, and clean would establish a prima facie case for the class." *Id.* at 109a. A total of 444 employees joined the collective action; the parallel class had 3344 members. J.A. 117.

b. The case proceeded to trial before a jury. The parties stipulated that employees were entitled to be paid for donning and doffing certain equipment worn to protect from knife cuts. J.A. 120. But it was for the jury to determine whether donning and doffing other protective and sanitary equipment was compensable, whether petitioner was required to pay for donning and doffing during meal breaks, and the total amount of time spent on work not compensated under petitioner's gang-time system. J.A. 473-481.

To establish the time employees spent on the activities at issue, respondents presented employee testimony, video recordings of donning and doffing at the plant, and a study performed by an industrial-engineering expert. Pet. App. 5a, 13a. Based on 744 videotaped observations, the expert estimated that donning, doffing, and related activities required 21.25 minutes per day for positions on the plant's slaughter floor and 18 minutes per day for positions on the processing floor. J.A. 123-124. A second expert combined those estimates with petitioner's available wage-and-hour records to calculate the amount of uncompensated overtime worked by each class and collective action member. J.A. 139. Based on those calculations, plaintiffs sought approximately $6.7 million in unpaid overtime. J.A. 139, 465-466.

The jury returned a special verdict finding that the disputed pre- and post-shift activities were compensable, but that donning and doffing during meal breaks was not. J.A. 486-487. It awarded roughly $2.9 million. J.A. 488.

3. The court of appeals affirmed. Pet. App. 1a-24a.

a. The court first rejected petitioner's contention that differences in the equipment worn by employees rendered the certification of the class and collective actions inappropriate, explaining that the employees "used similar equipment" and were paid under the same system. Pet. App. 7a-8a. The court recognized that determining the amount of unrecorded time worked by class members "require[d] inference" based on respondents' representative proof, but it held that "this inference is allowable under [*Mt. Clemens*]." *Id.* at 8a. The court rejected petitioner's challenge to the sufficiency of the evidence for similar reasons, holding that the jury could draw "a 'reasonable inference' of classwide liability." *Id.* at 12a-13a (quoting *Mt. Clemens*, 328 U.S. at 687).

The court also rejected petitioner's contention "that the class should be decertified because evidence at trial showed that some class members did not work overtime" and therefore were not entitled to recover. Pet. App. 8a. The court reasoned that a class may be certified even if some members' claims ultimately fail on the merits. *Id.* at 9a & n.5. It also observed that the jury instructions ensured that the presence of those class members did not increase the size of the verdict. *Id.* at 10a.

b. Judge Beam dissented, concluding that differences among employees should have precluded certification of the Rule 23 class. Pet. App. 14a-24a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 114a-131a.

SUMMARY OF ARGUMENT

I. Respondents' suit was properly maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) and a collective action under the Fair Labor Standards Act.

A. Respondents' Iowa-law claim satisfied Rule 23(b)(3)'s requirement that questions common to the class predominate over those affecting only individual members. That standard requires a court to assess the extent to which the plaintiffs' claim will be capable of class-wide proof. Here, the trial record and jury verdict demonstrate that respondents *did* prove their case on a class-wide basis. There is no dispute that respondents relied on common evidence to prove that all class members' pre- and post-shift activities were compensable under the FLSA. And because petitioner failed to record the time spent on those activities, respondents properly invoked the burden-shifting framework under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), to establish the extent of that unrecorded work using representative evidence.

Petitioner asserts that respondents' class-wide proof was inadequate, pointing to some differences in the protective equipment worn by class members and variations in the amount of time spent donning and doffing. Under *Mt. Clemens*, however, employees are not required to prove the precise extent of the work their employer improperly failed to record, and may instead rely on inferences drawn from representative proof. After considering essentially the same factual contentions petitioner presents here, the jury determined that respondents' representative proof was

sufficient to carry their burden on a class-wide basis. Petitioner provides no sound reason to second-guess the jury's verdict. In particular, petitioner's insistence that employees who did comparable work in the same plant must make individualized showings of pre- and post-shift work time echoes the standard of proof this Court emphatically rejected in *Mt. Clemens*.

B. Respondents' parallel FLSA claim was properly brought as a collective action. The FLSA itself grants employees a right to proceed collectively if they are "similarly situated." 29 U.S.C. 216(b). Here, that standard was amply satisfied because the opt-in plaintiffs worked in the same plant, engaged in comparable unpaid activities, and were subject to the same unlawful compensation policy.

II. The inclusion of some employees who were ultimately shown at trial to have no right to recover neither precluded certification of the class and collective actions at the outset nor required decertification following the jury verdict. Petitioner has rightly abandoned its contention that the possible presence of such individuals precluded certification altogether. And although petitioner is correct that parties who have been shown to have no right to recover should not be granted relief, petitioner forfeited that objection in this case by failing to seek to exclude such individuals from the action and by *opposing* a proposal to structure the trial to prevent them from sharing in any award. In any event, the jury instructions ensured that individuals who were not entitled to recover did not increase the size of the verdict.

ARGUMENT

I. RESPONDENTS' SUIT WAS PROPERLY MAINTAINED AS A CLASS ACTION UNDER RULE 23(b)(3) AND A COLLECTIVE ACTION UNDER THE FAIR LABOR STANDARDS ACT

A. Respondents' Suit Was Properly Maintained As A Class Action

Although petitioner frames the question before the Court as one about the rigor of Rule 23(b)(3)'s predominance standard, at bottom the parties' dispute turns on a question governed by the underlying substantive law: Where, as here, an employer violates the FLSA by failing to record its employees' working time, what proof is required to establish the extent of the unrecorded work?

This Court answered that question in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that such employees are not required to prove the "precise extent" of the work their employer improperly failed to record. *Id.* at 687. Since *Mt. Clemens*, it has been established that employees need not offer individualized proof of unrecorded working time, and may instead rely on inferences based on representative evidence about other employees who performed comparable work. In this case, no individualized inquiries were required at trial because respondents relied on the *Mt. Clemens* framework to prove their case on a class-wide basis. Petitioner's predominance argument thus reduces to the factbound contention that individualized inquiries *should have* been required because differences among class members

meant that respondents' common proof was insufficient to satisfy their burden under *Mt. Clemens*.[3]

That question—whether respondents' claim could be "proved on a classwide basis"—was certainly relevant to initial class certification. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2555 (2011) (*Wal-Mart*). But it was also a *merits* question, and it has now been resolved by a jury. After hearing nine days of evidence and considering essentially the same factual arguments about differences among class members that petitioner presents here, the jury determined that respondents' evidence was sufficient to carry their burden under *Mt. Clemens* on a class-wide basis. Petitioner identifies no sound basis for second-guessing that conclusion.

1. The predominance inquiry is shaped by the governing substantive law

Under Rule 23(b)(3), a class may be certified if the district court finds, *inter alia*, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). The district court must identify the relevant factual and legal issues and "compare the issues subject to com-

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[3] Although the Rule 23 class action involves a claim under an Iowa statute, the parties have litigated the case on the understanding that the FLSA and *Mt. Clemens* establish the governing substantive law. J.A. 479; see p. 9, *supra*.

mon proof against the issues subject solely to individualized proof." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50, at 197 (5th ed. 2012). The predominance inquiry thus "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted).

As this Court's decisions addressing securities-fraud class actions illustrate, the burdens borne by the parties under the governing substantive law play a critical role in determining whether issues are "capable of resolution on a common, classwide basis." *Halliburton*, 131 S. Ct. at 2184. If securities-fraud plaintiffs were required to prove direct reliance on a defendant's misrepresentations, the reliance element "would ordinarily preclude certification of a class action [under Rule 23(b)(3)] because individual reliance issues would overwhelm questions common to the class." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). But if the plaintiffs are able to invoke the fraud-on-the-market presumption recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), "the problem dissipates." *Wal-Mart*, 131 S. Ct. at 2552 n.6. The *Basic* presumption "is a substantive doctrine of federal securities-fraud law that can be invoked by any * * * plaintiff." *Amgen*, 133 S. Ct. at 1193. But that substantive doctrine also "facilitates class certification" because it allows the use of common proof to establish a "rebuttable presumption of classwide reliance" without individualized inquiries. *Ibid.*

2. Mt. Clemens *sets forth a substantive rule of law that allows employees to establish the extent of their unrecorded work with common proof*

Like the *Basic* presumption, the *Mt. Clemens* framework is a substantive doctrine that allows a group of employees to establish an element of their claim using common evidence. Employees need not offer individualized proof of the extent of their unrecorded work in order to carry their burden. Instead, evidence of the work performed by "a representative sample of employees" can be used to establish the extent of the work performed by the entire group. *Reich* v. *Southern New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) (*SNET*).

Mt. Clemens itself involved representative testimony from eight employees concerning work done by 300 collective-action plaintiffs. See pp. 5-6, *supra*. And decades of decisions confirm that *Mt. Clemens* allows the use of "representative employees to prove violations [of the FLSA] with respect to all employees" in a case. *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994). Indeed, "[c]ourts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees." *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); see *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278-1279 (11th Cir. 2008) (collecting cases), cert. denied, 558 U.S. 816 (2009); *Wages and Hours* § 9.03[2], at 9-32 (same).

Accordingly, the *Mt. Clemens* framework has "particular significance" under Rule 23(b)(3), *Amgen*, 133 S. Ct. at 1193, because it allows a group of employees to use common evidence to establish the extent of

their unrecorded work on a class-wide basis even though such proof "would ordinarily be individualized." *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009).

3. The trial record demonstrates that individual questions did not predominate because respondents properly invoked Mt. Clemens *to prove their case on a class-wide basis*

When predominance questions are presented at the class-certification stage, the district court necessarily must rely on predictions about "how the case will be tried." Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003). The court may also be required to determine whether the elements of the plaintiffs' claim will be "susceptible of class-wide proof," even though that question overlaps with the merits. *Ibid.*; see *Comcast*, 133 S. Ct. at 1432. Here, however, there is "no need to make a prediction" about how respondents' claim will be tried because this Court "ha[s] the benefit of seeing what ultimately took place at trial." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1259 (10th Cir. 2014), petition for cert. pending, No. 14-1091 (filed Mar. 9, 2015); cf. *Ortiz* v. *Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of [a] summary judgment motion."). Furthermore, to the extent the propriety of class certification turns on whether respondents' claims were capable of class-wide proof, the Court should not disturb the jury's finding—*i.e.*, that respondents *did* prove their

case on a class-wide basis—absent some error in the trial or a legal insufficiency of the evidence.[4]

The jury's special verdict resolved four common questions that determined the compensability of the disputed activities performed by all class members. The jury found that: (1) donning and doffing protective and sanitary equipment was "work" under the FLSA; (2) donning and doffing that equipment was "'integral and indispensable' to the employees' gang-time work" and therefore marked the start and end of the compensable workday; (3) donning and doffing during meal breaks was not compensable; and (4) the compensable activities were not de minimis. J.A. 486-487. Petitioner does not dispute (Br. 28-29) that those findings applied equally to all class members. The class-action procedure thus made it possible to resolve "in one stroke" issues that were "central to the validity of each one of the [class members'] claims." *Wal-Mart*, 131 S. Ct. at 2551.

The common conclusion that employees' pre- and post-shift work was compensable did not, of course, fully resolve the case. To establish that employees were entitled to additional overtime, respondents also had to show that they worked more than 40 hours per week and that the K-code time paid by petitioner did not fully compensate for pre- and post-shift work. But with a single exception, respondents relied on peti-

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[4] In other contexts, it is "well settled" that "'all findings necessarily made by the jury in awarding the verdict * * * are binding on the parties as well as on the trial court.'" *Dybczak* v. *Tuskegee Inst.*, 737 F.2d 1524, 1526-1527 (11th Cir. 1984) (citation omitted), cert. denied, 469 U.S. 1211 (1985); see 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4418 & n.24, at 472 (2d ed. 2002).

tioner's own records to establish all of the facts relevant to that showing. Using "time sheets" and "[p]ay data" obtained "directly from [petitioner]," respondents' expert provided individualized calculations for each class member (and aggregate calculations for the class) reflecting each worker's shift work (gang time) for each week, any additional K-code time paid, and the worker's rate of pay. Pet. App. 13a. There was no dispute over the expert's calculations, and petitioner does not appear to contend that those essentially mechanical determinations caused individual questions to predominate.

Petitioner's predominance argument depends, instead, on the one fact not discernible from its records: the time each employee spent on pre- and post-shift work. Had petitioner complied with its obligation to keep records of that time, the amount of additional compensable time would have been equally subject to mechanical proof. But petitioner asserts that, given the absence of such records, the only way for respondents to establish the time spent on pre- and post-shift work was through laborious individualized inquiries into the donning, doffing, and walking routines of each class member.

Petitioner's argument ignores the legal consequences of its recordkeeping violation. Petitioner assumes (Br. 19, 34) that each class member was required to prove the "actual" amount of time he spent on pre- and post-shift activities. Under *Mt. Clemens*, however, petitioner's recordkeeping violation relieved respondents of the need "to prove the precise extent of [their] uncompensated work." 328 U.S. at 687. Instead, respondents could carry their burden by using representative evidence to establish the extent

of employees' uncompensated work as a matter of "just and reasonable inference"—a standard that necessarily allows "approximat[ion]." *Id.* at 687-688.

Respondents followed that approach here, presenting representative testimony from employees, video recordings of donning and doffing, and a study calculating averages of pre- and post-shift working time for slaughter and processing positions based on 744 videotaped observations. Pet. App. 5a, 13a; J.A. 123-124. Such proof is permissible as a *substantive* matter under *Mt. Clemens*. Petitioner therefore errs in suggesting (Br. 36) that the class-action procedure lowered respondents' burden of proof or altered its substantive rights: The same standard would have applied in an enforcement action by the Secretary or an individual action by an employee, and either the Secretary or the employee could have relied on the same type of evidence to carry his burden at the first stage of the *Mt. Clemens* framework.

Petitioner could have sought to rebut the reasonable inferences drawn from respondents' proof. *Mt. Clemens*, 328 U.S. at 687. If, for example, petitioner believed that respondents' expert overlooked salient differences between jobs in the plant by dividing them into only two categories (slaughter and processing), petitioner could have presented a study using a different methodology—for example, dividing jobs between those that involved knives and those that did not, or relying on more granular categories. But petitioner made no effort to offer competing estimates of the time spent on pre- and post-shift work.

Instead, petitioner sought to present the jury with an all-or-nothing choice, arguing that it should deny recovery to the class because "there has been a total

lack of proof of representative evidence." Tr. 1751-1752. Indeed, a central theme of petitioner's closing argument was that respondents' representative proof could not support a class-wide award because the jobs in the plant required "different combinations of sanitary and protective items" that took different amounts of time to don and doff. Tr. 1753-1754; see Tr. 1751-1760, 1782-1783, 1786-1787. Petitioner thus presented the jury with essentially the same factual arguments it now seeks to have this Court accept as a basis for decertification.

The jury rejected those arguments and found respondents' evidence sufficient under the *Mt. Clemens* standard. Using language proposed by petitioner, the district court instructed the jury that respondents could prove their case using "representative evidence" from employees who performed "substantially similar" work, and it specifically instructed the jury to consider whether the class members "wore similar sanitary and protective items" and engaged in "similar" donning and doffing activities. J.A. 472; see J.A. 93. Again using language proposed by petitioner, the court further instructed that if the jury found the activities at issue compensable, it should apply the *Mt. Clemens* framework in determining the amount the class was entitled to recover. J.A. 480-481; see J.A. 100-101. In returning a verdict for the class, therefore, the jury necessarily concluded that the differences among class members were not so substantial as to prevent a reasonable inference of the amount of uncompensated work they performed.

The trial record and jury verdict thus demonstrate that respondents' suit satisfied Rule 23(b)(3)'s predominance requirement because respondents proved

their case on a class-wide basis. Individual issues did not "overwhelm questions common to the class," *Amgen*, 133 S. Ct. at 1193; to the contrary, aside from matters established mechanically with petitioner's own records, individualized inquiries were not required at all.

4. Petitioner's challenges to the lower courts' application of Mt. Clemens *lack merit*

Petitioner's challenge to the decision below thus at bottom must be based not on the stringency of the standard imposed by Rule 23(b)(3), but rather on the contention (Br. 40-44) that respondents' class-wide evidence failed to satisfy the *Mt. Clemens* standard. But petitioner has abandoned its direct sufficiency-of-the-evidence challenge, and its indirect attacks on the adequacy of respondents' proof lack merit.

a. Petitioner principally repeats its factbound argument (Br. 29-35, 42-44) that variations in the donning and doffing routines of individual class members rendered respondents' evidence insufficient for the jury to draw a reasonable inference of the extent of class members' uncompensated work. But petitioner provides no sound basis for disturbing the jury's determination. In particular, it is well-settled that employees relying on representative evidence need not establish that they performed *identical* work. All that is required is that the proof be "fairly representative"—a standard that necessarily allows for some variation. *Morgan*, 551 F.3d at 1279-1280 (citation omitted); see, *e.g.*, *DOL* v. *Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995); *Martin* v. *Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.), cert. denied, 505 U.S. 1204 (1992); *McLaughlin* v. *Ho Fat*

Seto, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989).

Petitioner insists (Br. 42) that *Mt. Clemens* cannot allow an employee to establish the extent of his uncompensated work based on the amount of time that "a *different employee*" spent performing "*different activities*" or support an award of damages based on "averages." But those arguments echo the stringent standard of proof rejected in *Mt. Clemens* itself. Like petitioner, the court of appeals in that case had emphasized that the uncompensated activities at issue "varied from department to department, and from job to job within the department," and like petitioner the court of appeals had insisted that such variation required individualized proof rather than reliance on an "estimated average of overtime worked." *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 462-465 (6th Cir. 1945). But this Court emphatically disapproved that "improper standard of proof," explaining that it would thwart enforcement of the FLSA and impermissibly penalize employees for their employers' recordkeeping violations. *Mt. Clemens*, 328 U.S. at 686-687.

The estimates offered by respondents' expert necessarily reflected some imprecision. But the initial burden under *Mt. Clemens* "is a minimal one" and tolerates such uncertainty. *Secretary of Labor* v. *DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991). The obligation to come forward with more precise estimates then shifts to the employer, who "bear[s] the lion's share of the burden," *ibid.*, because the employer's recordkeeping violation created the uncertainty in the first place and because the employer is best positioned to offer evidence of the "amount of work performed."

Mt. Clemens, 328 U.S. at 687. Accordingly, courts have consistently held that *Mt. Clemens* permits employees to rely on inferences from average working times—including average times spent "donning and doffing" by large groups of workers at meat-processing plants. *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir. 2011), cert. denied, 132 S. Ct. 1634 (2012); see also, *e.g.*, *Garcia* v. *Tyson Foods, Inc.*, 770 F.3d 1300, 1306-1307 (10th Cir. 2014).

It is of course true that the employees invoking *Mt. Clemens* must have engaged in sufficiently comparable work to allow the factfinder to draw reasonable inferences based on their representative proof. But the jury permissibly concluded that such inferences were reasonable here. In arguing otherwise, petitioner exaggerates the differences among class members. For example, petitioner places great weight (Br. 30-31) on the variation suggested by the outlier donning and doffing times observed in the study performed by respondents' expert. But the expert explained that most of his observations were "clustered around the average[s]," and the jury had a list of all the expert's observations and was able to evaluate that claim for itself. J.A. 348; see Pl. Ex. 242. Similarly, petitioner emphasizes (Br. 29-31) that employees wore varying combinations of protective equipment. But the district court, in certifying the class, found that the variation was "limited" and that there were "far more factual similarities than dissimilarities." Pet. App. 89a, 101a. The jury evidently agreed, finding that class members were sufficiently similar to permit reasonable inferences based on respondents' class-wide proof. Indeed, trial evidence showed that employees frequently rotated between jobs requiring

different equipment, meaning that the variation among *employees* was smaller than the variation among *jobs*. J.A. 210, 224-225, 234.

Petitioner therefore is wrong to suggest (Br. 42-44) that this case is comparable to *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). There, the plaintiffs proposed to use a "small, unrepresentative sample" of 42 hand-picked employees to establish the amount of work performed by more than 2000 employees who worked widely varying hours in different locations. *Id.* at 774-775. Petitioner's attempt to depict equally great differences among its employees is implausible—particularly because for much of the class period petitioner itself paid all class members exactly the same amount (four minutes per day) to cover pre- and post-shift activities. J.A. 121.

b. Petitioner also asserts (Br. 41) that the *Mt. Clemens* framework applies only to a determination of damages and not where, as in many overtime cases, proving the extent of unrecorded work is also a factor in determining liability. Petitioner therefore suggests that class members should have been required to establish liability—*i.e.*, the existence of some unpaid work in excess of 40 hours in at least one workweek—on an individualized basis.

It is well-settled, however, that *Mt. Clemens* permits employees to use representative evidence to establish the extent of their unrecorded work when that fact is relevant to liability as well as damages. This Court held that employees' initial burden is to establish that they "ha[ve] in fact performed work for which [they were] improperly compensated" and to provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable

inference." 328 U.S. at 687. But as *Mt. Clemens* itself illustrates, both of those showings can be made with representative proof. In that case, the Court found that 300 workers had carried their burden using representative testimony from eight employees. See pp. 5-6, *supra*. A rule requiring individualized evidence to establish an overtime violation with respect to each employee would contradict the central teaching of this Court's decision, which is that an employee's "burden of proving that he performed work for which he was not properly compensated" must be set with "[d]ue regard" to the fact that "it is the employer who has the duty under [29 U.S.C. 211(c)] to keep proper records." *Mt. Clemens*, 328 U.S. at 687.[5]

Lower courts have consistently held that the *Mt. Clemens* framework permits the use of inferences from representative proof to establish both liability and damages. See, *e.g.*, *Morgan*, 551 F.3d at 1278 (*Mt. Clemens* establishes a means to "prove an FLSA violation"); *SNET*, 121 F.3d at 66 (*Mt. Clemens* permits reasonable inferences related to "violations of the Act and the amount of an award") (quoting *Martin* v. *Selker Bros.*, 949 F.2d 1286, 1296-1297 (3d Cir. 1991)); *DeSisto*, 929 F.2d at 792 ("It is well established that not all employees need testify in order to prove [FLSA] violations."). Consistent with that precedent,

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[5] Petitioner relies (Br. 41) on this Court's statement that an approximate award of damages is permissible because liability is certain and "[t]he uncertainty lies only in the amount of damages." *Mt. Clemens*, 328 U.S. at 688. But that statement reflects the fact that if a court awards damages at the third step of the *Mt. Clemens* burden-shifting framework, the employees have by definition established a statutory violation at the first two steps. It does not foreclose the use of appropriate representative evidence to establish a violation in the first place. *SNET*, 121 F.3d at 69.

the jury in this case was instructed, without objection, that it was required to find by a preponderance of the evidence that the class members "ha[d] been underpaid," but that it could make that finding as to absent class members based on "inference" from "representative evidence." J.A. 471-472; see J.A. 464.

In addition, the jury's findings regarding compensable activities and the undisputed evidence regarding petitioner's pay practices indicate that all class members performed some unpaid work, even setting aside respondents' proof of the amount of time required for pre- and post-shift activities. At various points during the class period, petitioner paid certain employees K-code time to compensate for donning and doffing knife-specific protective gear, but before 2007 those payments did not include any allowance for compensable time walking to and from the locker rooms. J.A. 121-122. In addition, all class members were required to wear a basic set of sanitary and protective equipment. J.A. 119. The jury found that donning and doffing that equipment was compensable, but petitioner never included it in K-code time. J.A. 120-122, 486-487. Accordingly, so long as a class member otherwise worked at least 40 hours in a workweek, his entitlement to at least some unpaid overtime followed directly from the jury's findings on compensability. And the evidence further established that class members typically worked at least five (and often six) eight-hour shifts per workweek. J.A. 122, 326, 435.[6]

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[6] The evidence indicated that approximately 200 class members were not entitled to any overtime pay, and that other class members were owed only small amounts. J.A. 414-415. Respondents' expert explained that those individuals likely worked part time or

B. Respondents' Suit Was Properly Maintained As An FLSA Collective Action

Although petitioner principally challenges the certification of the Rule 23(b)(3) class, it also briefly contends (Br. 25) that the FLSA collective action should not have been allowed to proceed because the standards for a collective action "can be no less stringent" than those in Rule 23(b)(3). This Court need not decide that question because, as demonstrated above, Rule 23(b)(3) was satisfied here. But if the Court does address the issue, it should hold that a collective action need not conform to the reticulated requirements of Rule 23.

The FLSA confers on employees a "right" to bring a collective action. 29 U.S.C. 216(b). That "explicit statutory direction of a single [FLSA] action for multiple [FLSA] plaintiffs," *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 172 (1989), does not condition employees' right to proceed collectively on any showing beyond a demonstration that they are "similarly situated." To interpret Section 216(b) by incorporating the requirements of Rule 23, which was adopted decades later, "would effectively ignore Congress' directive" that a different standard applies. *Thiessen* v. *General Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001), cert. denied, 536 U.S. 934 (2002). It would also contravene the Advisory Committee's admonition that "[Section] 216(b) [was] not intended to be affected by Rule 23." Fed. R. Civ. P. 23 advisory committee's note (1966).

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were employed by petitioner for only a short period. J.A. 409-410, 429-430.

Rule 23(b)(3) embodies a different standard because "Rule 23 actions are fundamentally different from collective actions." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529 (2013). Section 216(b) is not a procedure for litigating the rights of absent class members, but rather a mechanism for allowing multiple employees to join an action as "party plaintiff[s]." 29 U.S.C. 216(b). And because Section 216(b) sets forth Congress's "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively," this Court has emphasized that its "broad remedial goal * * * should be enforced to the full extent of its terms." *Hoffmann-La Roche*, 493 U.S. at 170, 173.

Consistent with that understanding, the great weight of authority holds that "the FLSA's 'similarly situated' requirement is less demanding than Rule 23." 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. Supp. 2015); see, *e.g.*, *O'Brien*, 575 F.3d at 585-586; *Grayson* v. *K Mart Corp.*, 79 F.3d 1086, 1096 & n.12 (11th Cir.), cert. denied, 519 U.S. 982, and 519 U.S. 987 (1996); but see *Espenscheid*, 705 F.3d at 772. Rather than importing Rule 23(b)(3)'s predominance requirement, courts hearing collective actions consider factors including the similarity of the "factual and employment settings of the individual plaintiffs," any defenses "individual to each plaintiff," and "fairness and procedural considerations." *Thiessen*, 267 F.3d at 1103 (citation omitted); *Wages and Hours* § 9.02[3][b][i], at 9-20.

The district court considered those factors here and correctly concluded that a collective action was appropriate. Pet. App. 69a-90a. The opt-in plaintiffs worked in the same plant, were paid under the same unlawful policy, and performed comparable unpaid

work. A suit brought by such employees has long been a paradigmatic example of a collective action—as *Mt. Clemens* itself illustrates. A rule that variations in working time preclude such employees from vindicating their rights in a single suit would drain the collective-action procedure of much of its function and disserve the "broad remedial goal" of Section 216(b). *Hoffmann-La Roche*, 493 U.S. at 173.

II. THE PRESENCE OF EMPLOYEES WHO WERE ULTIMATELY SHOWN TO HAVE NO RIGHT TO RECOVER DID NOT REQUIRE DECERTIFICATION OF THE CLASS AND COLLECTIVE ACTIONS

Although respondents' trial evidence established that all class members engaged in some unpaid work, it also indicated that approximately 200 of them had no right to recover overtime because they never worked more than 40 hours in a workweek. J.A. 414-415. Petitioner could have sought to amend the class to remove those individuals or to structure the trial in a manner that would have prevented them from sharing in any award. But it failed to do so, and it may not invoke the result of its own tactical decisions as a basis for decertification after an unfavorable verdict.

A. The Possibility That Some Class Members May Ultimately Be Found To Have No Right To Recover Does Not Preclude Certification Of A Rule 23 Class

1. In seeking certiorari, petitioner asserted (Pet. 26) that a Rule 23 class may not be certified if it "includes members who were not injured and thus have no claim for damages." Petitioner has now essentially abandoned that position, acknowledging (Br. 49) that a class may be certified even "in the absence of proof that all class members were injured."

The Court may therefore wish to dismiss the second question presented as improvidently granted. Cf. *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015).

2. Any consideration of that question in this case would require two important clarifications.

First, petitioner at times "confuses weakness on the merits with absence of Article III standing." *Davis* v. *United States*, 131 S. Ct. 2419, 2434 n.10 (2011); see Pet. Br. 20-21, 44-45. Class members who did not work more than 40 hours in a workweek failed to establish one of the elements of an FLSA overtime claim. 29 U.S.C. 207(a)(1). Ordinarily, however, "[t]he question whether [parties] are entitled to the relief that they seek goes to the merits, not to standing." *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 151 n.1 (2010). Article III does not require dismissal for lack of jurisdiction every time an FLSA plaintiff fails to prove his case.

Second, many of the decisions cited in the petition considered whether a court may certify a class if it is clear at the outset that the class definition includes individuals who have no injury or lack a colorable legal claim. See, *e.g.*, *Kohen* v. *Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009), cert. denied, 559 U.S. 962 (2010). Here, in contrast, petitioner relies (Br. 52) on the fact that the evidence ultimately introduced at *trial* established that some class members lacked a right to relief.

3. Petitioner was correct to abandon its contention that the possible presence of such individuals precludes class certification at the outset. Provided that the requirements of Rule 23 are otherwise satisfied, a class may be certified even if *none* of its members

ultimately recover because the defendant prevails on the merits. *Amgen*, 133 S. Ct. at 1197 & n.5. It may also be appropriate—again, assuming compliance with Rule 23—to certify a class even where some members' claims may ultimately fail for individual reasons. *Halliburton Co.* v. *Erica P John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Indeed, requiring that a class be defined to include only individuals with meritorious claims would violate the rule that courts may not certify a "fail-safe" class "defined in terms of success on the merits." *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

B. The Presence Of Some Members Who Were Shown To Have No Right To Recover Did Not Require Decertification Of The Class And Collective Actions

Petitioner now advances the more modest argument (Br. 49) that a Rule 23(b)(3) class may be certified and maintained only if there is "some mechanism" to ensure that individuals who are shown to have no right to relief neither "contribute to the size of any damage award" nor "recover such damages." Petitioner is of course correct that a defendant should not be required to pay damages to individuals who are shown to have no right to recover, and a court considering whether to certify a Rule 23(b)(3) class should take into account the availability of mechanisms for identifying such individuals when assessing "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). In this case, however, such mechanisms were available, and they went unused only because of petitioner's own choices.

Here, the most sensible approach may have been to structure the trial so that the jury first made findings about the compensability of the activities at issue and

"the number of minutes it takes to perform [them]." J.A. 112-113. Calculating the "individual backpay amount for each class member" would then have been "ministerial." J.A. 113. Respondents proposed exactly that approach, *ibid.*, which would have ensured that only class members with meritorious claims received an award. But petitioner *opposed* that proposal, J.A. 115, and asked that the jury be permitted to make only a lump-sum award to the entire class, J.A. 104. Alternatively, when respondents' trial evidence revealed that some class members were not entitled to recover, petitioner could have moved to exclude those individuals from the class. Fed. R. Civ. P. 23(c)(1)(C). But petitioner did not do that either.

Petitioner's contention that the inclusion of some class members who are not entitled to relief requires that the entire class be decertified is also unavailing because the jury instructions ensured that those individuals did not contribute to the size of the award. Pet. App. 10a. At petitioner's request, the district court instructed the jury that backpay was owed only for "hours worked in excess of 40 hours in each workweek" and that "[a]ny employee who has already received full compensation * * * is not entitled to recover any damages." J.A. 481; see J.A. 471. The presence of such employees thus had no effect on petitioner's liability to the class and is relevant only to allocation of the award among the class members—a step that has not yet occurred and in which petitioner has no stake. *Urethane*, 768 F.3d at 1269.

Finally, petitioner's suggestion (Br. 45, 51) that the presence of employees who lacked meritorious claims required "decertification" of the FLSA collective action is particularly unsound. A collective action

"does not produce a class with an independent legal status." *Genesis Healthcare*, 133 S. Ct. at 1530. Instead, it authorizes similarly situated employees to join an action as "party plaintiff[s]." 29 U.S.C. 216(b). A showing that some of those plaintiffs lack a right to relief would be grounds for dismissing them from the action or rejecting their claims on the merits, but provides no basis for preventing the remaining plaintiffs from going forward. *O'Brien*, 575 F.3d at 586.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2015

APPENDIX

1. 29 U.S.C. 206(a)(1) provides:

Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

2. 29 U.S.C. 207(a)(1) provides:

Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. 29 U.S.C. 211(c) provides:

Collection of data

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or

orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

4. 29 U.S.C. 216(b) provides:

Penalties

(b) **Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such con-

sent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

5. 29 C.F.R. 516.2(a) provides:

Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security record-keeping purposes, and on the same record, the employee's

identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

6. 29 C.F.R. 785.19(a) provides:

Meal.

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal

period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

7. 29 C.F.R. 785.47 provides:

Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) This rule applies only where there are

uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results." *Hawkins v. E. I. du Pont de Nemours & Co.*, 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

8. 29 C.F.R. 790.6 provides:

Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that

period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without

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[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would

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[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

10. Fed. R. Civ. P. 23 provides in pertinent part:

Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual

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[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * * * *

11. Iowa Code 91A.3 provides in pertinent part:

Mode of payment

1. An employer shall pay all wages due its employees, less any lawful deductions specified in section 91A.5, at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer. However, if any of these wages due its employees are determined on a commission basis, the employer may, upon agreement with the employee, pay only a credit against such wages. If such credit is paid, the employer shall, at regular intervals, pay any difference between a credit paid against wages determined on a commission basis and such wages actually earned on a commission basis. These regular intervals shall not be separated by more than twelve months. A regular payday shall not be more than twelve days, excluding Sundays and legal holidays, after the end of the period in which the wages were earned. An employer and employee may, upon written agreement which shall be maintained as a record, vary the provisions of the subsection.

* * * * *

12. Iowa Code 91A.8 provides:

Damages recoverable by an employee

When it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section 91A.3, whether as

the result of a wage dispute or otherwise, the employer shall be liable to the employee for any wages or expenses that are so intentionally failed to be paid or reimbursed, plus liquidated damages, court costs and any attorney's fees incurred in recovering the unpaid wages and determined to have been usual and necessary. In other instances the employer shall be liable only for unpaid wages or expenses, court costs and usual and necessary attorney's fees incurred in recovering the unpaid wages or expenses.

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

—v.—

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AARP, INTERFAITH WORKER JUSTICE, NATIONAL EMPLOYMENT LAW PROJECT AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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September 29, 2015

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BRIEF OF AARP, INTERFAITH WORKER JUSTICE, THE NATIONAL EMPLOYMENT LAW PROJECT AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of older workers and strives through legal and legislative advocacy to preserve the means to enforce their rights. This case concerns the continuing vitality of collective actions under the Fair Labor Standards Act, which uses the same procedural enforcement mechanisms and remedies as the Age Discrimination in Employment Act. AARP has a strong interest in preserving the ability of similarly-situated workers to proceed collectively and to cooperate in meeting

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to Court Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

their burden of proof, both in wage and hour cases and in federal age discrimination cases.

Interfaith Worker Justice (IWJ) is a national organization with 60 affiliate groups and 29 workers' centers that call upon its members' religious values to educate, organize, and mobilize the religious community and low-wage workers on issues and campaigns that will improve wages, benefits, and working conditions for workers across the United States. IWJ workers' centers collectively have more than one thousand members, including meat processing workers in multiple states as well as members in the hospitality, manufacturing, construction, poultry processing, day labor, janitorial, and retail and other service industries where wage theft is prevalent.

IWJ and its workers' centers seek to ensure that IWJ members are able to act collectively to recoup unpaid wages in the face of employers that do not keep accurate time records, the fear of retaliation, and the fact of relatively low individual recoveries.

The National Employment Law Project (NELP) is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers under federal employment and labor laws, with a special emphasis on wage and hour rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state fair pay laws. NELP's national three-city survey, *Broken Laws, Unprotected Workers,* shows the dire conditions of jobs in low-wage sectors. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our

nation's labor and employment laws; this work has given us the opportunity to learn up close about job conditions around the country in the low-wage jobs where basic fair pay violations persist. These non-payments create hardships for workers and their families, and these workers face severe barriers to enforcing their rights to fair and lawfully required pay, making collective and class action mechanisms vital to upholding the wage floor.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

INTRODUCTION

Sixty-nine years ago, this Court decided *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which has since then governed wage and hour litigation across the country. While both Petitioner and its *amici* attempt to portray *Mt. Clemens* as consistent with their position, they ignore its core con-

siderations and rulings, and urge the Court to diminish or effectively vitiate collective enforcement of the Fair Labor Standards Act by requiring individual-by-individual proof. The "collective action" mechanism enacted by Congress in Section 16(b) (29 U.S.C. § 216(b)) of the Fair Labor Standards Act (the "FLSA") allows "similarly situated" employees to join together to prosecute their claims, which furthers the FLSA's "broad remedial goal" and provides plaintiffs with "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La Roche, Inc., v. Sperling*, 493 U.S. 165, 170-71 (1989).

Amici here address three primary points. First, the core holding in *Mt. Clemens* is its recognition that often employees will not have the ability to prove through direct evidence that they were underpaid due to their employer's failure to keep records of hours worked, and for that reason they may prove their case through not perfectly precise evidence that raises a "just and reasonable inference" of the violation. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]." *Mt. Clemens*, 328 U.S. at 688. To not permit cases to proceed absent exact evidence of damages would reward "an employer's failure to keep proper records in conformity with his statutory duty." *Id.*

Second, *amici* set out how, following *Mt. Clemens*, FLSA collective actions have been litigated on a "representative" basis, whereby the employees present the testimony of a representative sample of employees as part of their proof of the prima facie case, and from that testimony and other available evidence prove all employees' claims as a matter of just and

reasonable inference. This seven decades-long approach is grounded in *Mt. Clemens* itself, where the Court found liability based upon the testimony of eight employees out of 300. The courts have established procedures for these cases, including requiring an upfront finding that the employees are "similarly situated" under Section 216(b), and using discovery and case management techniques to insure the fairness of the process. Missing from Petitioner and its *amici* is any real suggestion that the use of representative testimony and of just and reasonable inferences to determine damages has not worked well. Without these procedural efficiencies, there would be floods of individual wage and hour cases in the district courts or some cases would never be brought, permitting companies that evade the law to be rewarded. A multiplicity of often duplicative cases and trials is what occurs when FLSA collective actions are decertified prior to trial, and cases are too far along to be consolidated.

Third, the need for efficient collective wage and hour actions becomes even more important in the face of the overwhelming and persistent wage theft that continues to plague worksites around the country. In too many low-wage workplaces (like the meat processing plant in this case) employees work off the clock, their employers are rewarded for a failure to keep time records, and the workers fear proceeding individually to seek their proper pay.

ARGUMENT

I. *MT. CLEMENS* AND ITS PROGENY PERMIT REPRESENTATIVE PROOF WHEN THE EMPLOYER FAILS TO KEEP RECORDS.

A. *Mt. Clemens'* Two Rulings

While some wage and hour cases present the issue of whether the overtime that was paid was appropriately determined, the vast majority of wage and hour litigation presents situations where the employer did not keep records of the overtime allegedly worked.[2] In Section 11(c) of the Act Congress mandated that employers "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him...." 29 U.S.C. § 211(c); *accord* 29 C.F.R. § 516.2. *Anderson v. Mt. Clemens Pottery* addresses the failure of an employer to comply with that provision, and the manner in which the Court handled it has governed wage and hour litigation since.

The issue the Court set out in *Mt Clemens* was how to address the fact that:

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[2] The vast majority of wage and hour claims brought as collective actions under 29 U.S.C. § 216(b) fall into two categories: (1) claims for off-the-clock work (the claims at issue in the present case), and (2) claims where employees allege they were misclassified as overtime-exempt (and were not paid overtime at all). In both, the number of hours worked and what was done during those hours are the critical issues. The third category of FLSA claims asserts that the overtime paid was improperly determined (*e.g.*, when an employer improperly docks vacation pay). *See generally* 2 *The Fair Labor Standards Act* § 19.IV.D, pp. 19-55 – 19-72 (Ellen C. Kearns ed., 2d ed. 2010).

> Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. at 687.

The Court recognized that the solution cannot be "to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" because "[s]uch a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act." *Id.*[3]

To prevent workers from being penalized by the employer's failure to keep records of hours worked, the Court provided that plaintiffs could meet their burden of proof so long as they "prove[] that [they have] in fact performed work for which [they were] improperly compensated" and "produce[] sufficient evidence to show the amount and extent of that

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[3] These words appear particularly apposite in the context of this case, inasmuch as the reason plaintiffs had to use representative proof below was because of Tyson's failure to keep proper time records. Petitioner is a sophisticated employer that should have been keeping such records, especially due to the years of lawsuits against it that have alleged wage and hour violations and resulted in an injunction to comply. *See* Resp. Br. 7-8. To allow it to escape liability for its own failure to abide by the law – indeed, an injunction against it – would reward its own contemptuous view of the law and create the very injustice that *Mt. Clemens* presciently anticipated.

work as a matter of just and reasonable inference." *Id.* at 687. Accordingly, while the court of appeals in *Mt. Clemens* had reversed a judgment in favor of the employees because an employee cannot "base his right to recovery on a mere estimated average of overtime worked," *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 465 (6th Cir. 1945), this Court reversed. Since *Mt. Clemens*, federal courts have time and again affirmed the importance of the just and reasonable inference standard. *See, e.g., S. New England Telecomm. Corp.*, 121 F.3d 58, 69 (2d Cir 1997) (a "rule preventing employees from recovering for uncompensated work because they are unable to determine precisely the amount due would result in rewarding employers for violating federal law"); *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("*Mt. Clemens Pottery* leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA".)

The second half of the *Mt. Clemens*' decision addressed the issue of liability. The Court concluded that the employees had proven liability through what is now termed representative testimony – having a subset of the group of affected employees testify at trial. When this Court wrote that "we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute" and "the damage is therefore certain," 328 U.S. at 688, it was referring to the fact that liability was established based on the testimony of 8 out of 300 employees and the company's proffered testimony of its supervisors. *Mt. Clemens*, 149 F.2d at 461-62. The Court concluded, as to liability, both that "the employees did prove, however, that it

was necessary for them [*i.e.*, all the employees] to be on the premises for some time prior and subsequent to the scheduled working hours," 328 U.S. at 690, and that "[t]he employees proved, in addition, that they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-93.

The use of what is now called representative testimony has been relied upon as an integral part of overtime litigation since *Mt. Clemens*. *See generally* Kearns, *supra*, at 19-185 & n.638 (citing numerous decisions). Representative actions have been upheld by all the appellate courts to have addressed the issue, where they have interpreted *Mt. Clemens* to mean that it "authorize[d] some employees to testify about the number of hours they worked and how much they were paid so that other non-testifying plaintiffs could show the same thing by inference." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278-79 (11th Cir. 2008) (citing *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995) ("Under *Mt. Clemens*, the Secretary can present testimony from representative employees as part of his proof of the prima facie case."[4]); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991) (interpreting *Mt. Clemens* burden-shifting and noting that the plaintiff "can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement"); *McLaughlin v. Ho Fat Seto*, 850 F.2d

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[4] The *prima facie* case that is that an employee was not paid in accordance with the requirements of the law.

586, 589 (9th Cir. 1988) ("We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees.").[5] *See also Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) ("[T]he jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities.") (citing *Mt. Clemens*); *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997) ("In meeting the burden under *Mt. Clemens*, the Secretary need not present testimony from each underpaid employee; rather, it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."); *see also, e.g., U. S. Dept. of Labor v. Cole Enters.*, 62 F.3d 775, 781 (6th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994); *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992); *Martin v. Selker Bros.*, 949 F.2d 1286, 1298 (3d Cir. 1991); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224 (1st Cir. 1982);

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[5] The term "representative action" has had two meanings in the FLSA's history. Originally, the FLSA permitted actions to be brought not just by employees on behalf of themselves and other similarly situated but also by "agents" or "representatives" who were not employees (such as labor unions or even unaffiliated third parties). With the Portal-to-Portal Act of 1947, Congress limited FLSA cases to cases brought by employees and the Secretary of Labor. *See Fair Labor Standards Act*, *supra* at 1-21. In modern parlance, "representative actions" refer to the use of use of representative testimony from a subset of the individuals who have individually joined a FLSA collective action. *See, e.g., Morgan*, 551 F.3d at 1278-79.

Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 829 (5th Cir. 1973).

In addition, from a practical standpoint, the very nature of overtime claims often does not permit drawing a line between "liability" and "damages", because proof that an employee worked overtime (liability) usually means proof of the amount of overtime (damages) through the same evidentiary method. Proving liability can be inextricably intertwined with proving damages because the question of "did you work overtime and not get paid for it" is invariably linked to "how much overtime did you work?" In other words, proof as to the number of hours worked is, in most cases, going to be the same proof as to liability.[6]

In short, *Mt. Clemens* established a framework, relied upon by the courts in hundreds of cases since then that have found, as the Fourth Circuit 30 years ago, "[t]here is no requirement that to establish a *Mt. Clemens* pattern or practice [*i.e.*, liability], testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*." *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985), *overruled on other grounds, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

Petitioner and its *amici* ignore these well-established principles and jurisprudence. A theme running through their briefing is, as stated by one

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[6] In those situations where the evidence across a collective may materially vary, courts can apply bifurcation of liability and damages. *See* pages 19-20, *infra*.

amicus, "Tyson was entitled to an individual assessment of liability based on the different circumstances of each plaintiff." Pacific Legal Foundation Br. 3. Perhaps because such a statement is incompatible with *Mt. Clemens* and how FLSA representative actions work, that particular *amicus* ignores *Mt. Clemens* and asserts the proposition solely as a matter of the Rule 23 class in this case – but the principle is no different vis-à-vis FLSA representative actions because in them the trier of fact also extrapolates liability and damages from a subset of the whole.

Petitioner and those of its *amici* that cite *Mt. Clemens* (many ignore it) attempt to cabin it by having it – in the words of one *amicus* – "stand[] only for the modest principle that, when liability has been shown and the employer's records are inadequate, identically situated employees may prove damages on a class-wide basis" Cato Institute Br. 14.[7] This statement is hyperbolic inasmuch as "identicality" is a concept foreign to the *Mt. Clemens* opinion, and wars with the application of any "just and reasonable

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[7] Petitioner itself writes that "[N]othing in [*Mt Clemens*] allows an employee to prove that she was not properly compensated based on the amount of time that a *different employee*—much less a fictional "average" employee—spent performing *different activities* that admittedly took *different amounts of time* to perform." Pet. Br. 42 (emphasis in original). This statement, however, says little (because, of course, this Court did not permit mass adjudication where the individual claimants are materially differently situated) and, more fundamentally, assumes that the differences at issue were material. The point of any similarly-situated analysis is to determine how material the differences are vis-à-vis the application of the law at issue. What Petitioner ignores with its negative statement of what *Mt Clemens* did not permit is that *Mt Clemens* did permit representative testimony to determine liability and imperfect approximations of time for damages.

inference." "Identicality" cannot be squared with the way in which the Court found liability in the laundry list of "preliminary activities" in *Mt. Clemens*, which differed from employee to employee. Petitioner and its *amici* essentially contend that only where individual liability has been proven does *Mt. Clemens* then permit damage assessment on a non-individualized basis. *See* Pet. Br. 41-42; Association Of American Railroads Br. 17; Atlantic Legal Foundation Br. 24-25; Chamber of Commerce Br. 14; DRI—The Voice Of The Defense Bar Br. 9-10.

In sum, at the same time these *amici* decry the use of aggregate litigation to extrapolate from the experiences of a subset to the whole as an improper "trial by formula", *see, e.g.*, Chamber of Commerce Br. 17, that is in fact what occurred in *Mt. Clemens* and has been the routine methodology in representative action trials for decades of wage and hour litigation following it.

B. Decades of Section 216(b) Representative Actions And Trials Have Worked Successfully.

Missing from Petitioner and its *amici* is any real suggestion that the use of representative testimony and of just and reasonable inferences to determine damages has not worked well.[8] Nor do they,

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[8] Petitioner and its *amici* do not assert that the system is broken. Indeed, their briefing is bereft of examples of supposedly erroneous outcomes. The only wage and hour case (beyond this case) that is decried as wrongfully decided is Wal-Mart's complaint of a case that it lost at trial and on appeal. *See* Wal-Mart Br. 5.

with the exception of the present case, try to point to supposedly unjust lower court decisions.[9]

Courts have been vigilant in ensuring the process in wage and hour aggregate litigation works fairly. The results have benefitted both sides, with collective action verdicts that have been rendered in favor of both employees and employers. For example, in the last ten years there have been five FLSA collective trial decisions addressing claims of alleged employee misclassification – two were won by plaintiffs and three were won by defendants. *Compare Morgan*, *supra* (collective action plaintiffs' verdict); *Stillman v. Staples, Inc.*, 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 11, 2009) (same); *with Perkins v. Southern New England Telephone Co Inc.* No. 3:07-00967, Dkt. 578 (D. Conn. Oct. 24, 2011) (collective action defendant's verdict); *Henry v. Quicken Loans, Inc.*, Case No. 2:04-cv-40346-SJM-MJH (E.D. Mich. 17, 2011) (same); *Bell v. Citizens Fin. Group, Inc.*, 2:10-cv-00320 (W.D. Pa.) (Apr. 21, 2013) (same).

Few cases are alike in this area of law because there is wide variation in the claims that can be pre-

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[9] In its *Mt. Clemens* discussion, petitioner cites only to a single lower court FLSA case, *Espenscheid v. DirectSat USA*, LLC, 705 F.3d 770, 774-75 (7th Cir. 2013). *Espenscheid* had both a district and Circuit court exhibiting diligence in refusing to permit a collective action to proceed to trial on an improper basis. There, the Seventh Circuit affirmed the trial court's decertification where the plaintiffs had presented no basis to determine whether the plaintiff employees who would testify at a trial were in any way "representative" of the other members of the FLSA collective. This contrasts to the mechanisms routinely used to allow the representative discovery process address this issue (such as through the methods by which the representative discovery opt-ins are chosen once a collective exists, *see* pages 17-18, *infra*).

sented – from claims arising out of employees at a single location, to job classifications applied nationwide, or from claims that involve a specific and single job title to those that involve multiple job titles. Courts have used a wide range of procedures and case management tools to ensure fairness and due process, as briefly described below.

(a) Requiring a showing that employees are similarly-situated.

Courts of appeals that have addressed the matter have all agreed that before a FLSA collective action can proceed to trial the plaintiff employees bear the burden of showing that "a so-called 'collective action' may go forward by [proving that] the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers v Hertz*, 624 F.3d 537, 555 (2d Cir. 2010); *accord also Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 537 (3d Cir. 2012) ("we conclude that the burden is on the plaintiffs to establish that they satisfy the similarly situated requirement"); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) (same); *Morgan*, 551 F.3d 1261-62 ("the plaintiff bears a heavier burden"); *accord also, e.g., Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001).[10] There are a number of relevant factors that can go into this analysis. These:

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[10] The determination that a collective action can proceed to trial is what is referred to as the "second stage" certification determination. It generally follows a "first stage" determination that provides for notice to be sent to potential opt-ins who then can join the case. This two-stage process has been adopted by all federal circuits that have considered the matter as an effective way to balance the rights of employees and employers. *See, e.g. Myers*, 624 F.3d at 555; *Morgan*, 551 F.3d at 1261; *Thiessen*, 267 F.3d at 1102-03.

> include (but are not limited to): whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar based on the existence of individualized defenses. *See Ruehl*, 500 F.3d at 388 n.17. This list is not exhaustive, and many relevant factors have been identified. *See* 45C Am. Jur. 2d Job Discrimination *§ 2184* (listing 14 factors to be considered in determining whether proposed collective action plaintiffs are "similarly situated" under the ADEA).

Zavala, 691 F.3d at 536-37.

In overtime cases, the parties dispute just how similar employees are; they disagree as to whether individual differences are material; and they fight over whether there are individualized inquiries or defenses that may be presented. "[U]ltimately," however, "whether a collective action is appropriate depends largely on the factual question of whether the plaintiff employees are similarly situated to one another." *Morgan*, 551 F.3d at 1262; *see also* pages 21-22, *infra* (addressing the scope of evidence in the case that supported the collective action verdict). And notwithstanding the varying situations, courts have often avoided judgments or trials in situations where non-similarly situated employees were presented. *See, e.g., Reich*, 43 F.3d at 951 (where only 1.6% of the employees testified and the case involved

differing positions, case was remanded "for a new trial with testimony from a larger representative employee population, reflecting the complexity of this case, and the different positions, departments, shifts, pay periods, and time periods involved."); *DeSisto*, 929 F.2d at 793 ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award."); *Donovan v. New Floridian Hotel*, 676 F.2d 468, 472, 476 (11th Cir. 1982) (while recognizing "it is clear that each employee need not testify", affirms determination that evidence was insufficient to support back wage award to 56 of 263 employees who had performed job duties that were distinct from those of testifying employees); *see generally* 2 *Fair Labor Standards Act*, *supra*, at 19-172 – 19-177 (citing additional cases).

(b) Discovery methods.

Courts also commonly use discovery mechanisms to ensure fairness, including requiring random selection, allowing each side to choose opt-ins for discovery, and permitting defendants to choose some (often a great many) of the opt-in plaintiffs for full discovery. These discovery methods are common. *See, e.g.*, *Lusardi v. Xerox Corp.*, 855 F. 2d 1062, 1066 (3rd Cir. 1988) (random sample group); *Barrus v. Dick's Sporting Goods, Inc.*, 465 F. Supp. 2d 224, 231-32 (W.D.N.Y. 2006) (same); *Smith v. Lowe's Home Centers, Inc.*, 236 F.R.D. 354, 356-58 (S.D. Ohio 2006) (same); *Goodman v. Burlington Coat Factory Warehouse Corp.*, 292 F.R.D. 230, 233 (D.N.J. 2013) (allowing the employer to choose all opt-ins subject to representative discovery, and noting that "although

discovery in the case will be 'extensive,' it is not limitless. Not only would limitless discovery endlessly delay the case, but it would abrogate the Court's role to 'secure the just, speedy, and inexpensive determination' of the case. *Fed. R. Civ. P. 1.* There comes a point where the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother"); *see generally* 2 *Fair Labor Standards Act, supra*, § 19.VIII.A at 19-117 – 19-123 (addressing approaches to discovery of opt-ins; citing numerous decisions).

To further ensure trial fairness, courts will allow employers to seek leave to obtain additional discovery, after discovery of an initial subset of opt-ins, to demonstrate that the collective action members are dissimilar. *See, e.g., Craig v. Rite Aid Corp.*, 2011 U.S. Dist. LEXIS 13843, at *22-23 (M.D. Pa. Feb. 7, 2011) (to avoid the time and expense of discovery of all opt-ins, court initially limited discovery in 1,000 employee case to 50 opt-ins, writing "[i]n reaching this conclusion, we emphasize that after the parties have engaged in this representative discovery, the parties may return to the Court if they believe that additional discovery is warranted after examining what has been learned through this initial representative process."); *Spellman v. Am. Eagle Express*, 2011 U.S. Dist. LEXIS 149919, at *1 (E.D. Pa. Nov. 30, 2011) (after limiting depositions in number and length, providing that defendant could request additional depositions upon a showing of good cause); *see also Burlington*, 292 F.R.D. at 233 (allowing defendant leave to depose any plaintiff who will testify at trial, even after the close of fact discovery). In this case, Petitioner did not avail itself of such available procedures. *See* Respondent Br. 13-14, 19-20, 45-47.

For it to now claim it was denied due process is thus absurd: the process it was denied was what it failed to seek.

When there are a material number of atypical collective action plaintiffs that would make trying the claims of all the members in a single trial unfair, courts have permitted employers to demonstrate the materiality of differences between the plaintiffs. Such demonstrations can come at nearly any point in the litigation. Indeed, cases have been decertified at the close of discovery, *see, e.g., Steavens v HMS Host, Corp.*, 10-cv-03571, 2014 U.S. Dist. LEXIS 119653, *22 (E.D.N.Y. Aug. 26, 2014); on the eve of trial, *e.g., Espenscheid v. Direct Sat USA, LLC*, 09-cv-625, 2011 U.S. Dist. LEXIS 56062 at **12-13 (W.D. Wis. May 23, 2011), *aff'd*, 705 F.3d 770 (7th Cir. 2013), and even during trial. *See, e.g., Morganelli v. Chemed Corp.*, 275 F.R.D. 99, 121 (E.D.N.Y. 2011); *Johnson v. Big Lots Stores, Inc.* 561 F. Supp. 567, 568, 588 (E.D. La. 2008).

(c) Trial management tools – bifurcation and subclasses.

Courts have also employed trial management mechanisms to address potential differences within groups of employees, such as bifurcation of liability and damages determinations,[11] or subclassification of

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[11] *See, e.g., Wilks v. Pep Boys*, 02 Civ. 0837, 2006 LEXIS 69537 at *7 (M.D. Tenn. Sept. 26, 2006) (denying motion to decertify and stating that, to allow defendant's individualized defenses, the court "will consider bifurcation of the case into a liability stage, where the parties could address the alleged existence of an impermissible policy or practice, and a damages one, where they could, if necessary, debate the impact of the policy or practice on individual plaintiffs"); *Crawford v. Lexington-Fayette Urban County Gov't*, 06 Civ. 299, 2008 LEXIS 56089, at *11 (E.D. Ky. July 22, 2008) (stating that, while denying mo-

the collective. *See, e.g., Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 369 (S.D.N.Y. 2007) (noting that subclassification and decertification are options for district courts); *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 813 (M.D. Tenn. 2008) (finding it appropriate to have two subclasses of meat processing employees depending as a result of differences between their work); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. 1998) ("should discovery [following notice certification] reveal that plaintiffs in fact are not similarly situated, or that only plaintiffs who worked in the same Ark restaurant or who held the same job type are similarly situated, I may later decertify the class, or divide the class into subgroups, if appropriate") (Sotomayor, *J.*); *see generally* 2 *Fair Labor Standards Act*, *supra*, § 19.XI.D at 19-168 – 19-169 (addressing cases). The Petitioner in this case, notwithstanding having been the defendant in the *Jordan* case, failed to seek to take advantage of any such mechanisms (such as subclassification between departments or knife-welding or non-knife welding positions) – and it should not be rewarded for this failure. Indeed, Respondents here who sought bifurcation of liability and damages (at which stage of the proceedings Petitioner could have shown whether any individuals had failed to suffer damages) and it was Petitioner who opposed bifurcation. *See* Resp. Br. 13-14.

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tion to decertify, bifurcation can allow individualized determination of damages and "should not preclude collective adjudication of the central issue of whether there was a[n] [unlawful] policy"); *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1025 (D. Minn. 2007) (denying motion to decertify while recommending bifurcation to promote manageability of the collective action because the individualized defenses that defendant asserted chiefly related to issues of damages).

(d) The scope of information and evidence available to both sides also ensures fairness.

Finally, and no less consistent with *Mt. Clemens* recognition that employers can present "evidence to negative the reasonableness of the inference drawn from the employees' evidence," 328 U.S. at 687-88, defendants like Petitioner have a wealth of information at their disposal to show differences across the collective or class. That information includes personnel files; the testimony and recollections of other employees and supervisors; modern electronic data that contain time-relevant information such as telephone calls, computer log-ins, or video records. *Morgan v. Family Dollar Stores*, a leading court of appeals decision, is illustrative. In *Morgan*, in affirming a collective action FLSA verdict, the Eleventh Circuit described the breadth and depth of the testimony and evidence that had been presented, including, among other things:

> hundreds of Family Dollar's records detailing its policies and procedures. These records included Family Dollar's Store Policy Manual, subsequent manual revisions, four volumes of the Professional Development Training Reference Book, the Personnel Training Manual, various Frequently Asked Question documents, 'Weekly Work Schedules,' and emails by district managers to store managers. The parties also introduced a large volume of payroll records showing (1) the number of hours worked by each Plaintiff store manager each week, (2) each store manager's salary and rate of

> pay, and (3) the number of hours every employee worked each week. Both parties submitted multiple exhibits summarizing payroll data in easy-to-digest charts"; other evidence included payroll budgets, staff schedulers, directives, corporate FAQs, and numerous corporate policies, all in addition to individual and corporate designee witnesses.

Morgan, 1247, 47-57. In response to the employer's contention that the use of representative testimony was improper because "not enough Plaintiffs testified" to ensure a "reliable" liability verdict, the court of appeals wrote:

> the jury's verdict [] was not based on the testimony of just seven Plaintiffs. Instead, the parties presented an abundance of trial evidence about the executive exemption issue, including (1) a vast array of corporate manuals; (2) testimony from 39 witnesses including Family Dollar executives, district managers who ran the operations of 134 stores, and store managers who worked at a total of 50 different stores; (3) detailed charts summarizing wages and hours; and (4) a wealth of exhibits including emails, internal Family Dollar correspondence, payroll budgets, and in-store schematics. If one factors in that [two testifying managers] oversaw thousands of stores, the witnesses go from representing hundreds of stores to thousands. In addition to the large quantity of testimonial evidence, the non-

> testimonial evidence was equally high in quality and largely comprised of Family Dollar's corporate records. The jury's verdict is well-supported not simply by "representative testimony," but rather by a volume of good old-fashioned direct evidence.

551 F.3d at 1277. *See also, e.g., Stillman*, 2009 U.S. Dist. LEXIS 42247 at **69-77 (detailing the scope of evidence supporting a representative action collective jury verdict on behalf of 342 assistant store managers in a misclassification case).

With so many forms and scope of evidence readily available, an employer can attack certification for trial much more easily than Plaintiffs can defend it, because employers have far more information at their disposal than do Plaintiffs, who, if not provided with records of their hours worked and pay received, often have little more than their recollections (which can be cross-examined) – a point seemingly lost in the brief of Petitioner and its *amici* who present the landscape as a one-sided employees-favoring endeavor to which rebuttal is impossible. But, as noted above, the problem is created at the beginning by employers who fail to comply with the law by simply keeping records.

* * *

Inasmuch as some employers like Petitioner will resist taking the steps necessary to comply with the law, without some possibility of collective litigation to pursue wage and hour claims, the district courts will be burdened by cases even where large numbers of workers' claims are materially similar. For example, in the *Morgan v. Family Dollar Stores* case discussed above, had there not been a collective action trial there would have been 1,424 individual

trials regarding substantially similar claims. *Morgan*, 551 F.3d at 1265.

Congress permits the collective adjudication of "similarly situated" individuals under Section 216(b), and courts have been vigilant in managing collective cases to avoid the docket-clogging alternative of individual adjudications. The alternative is shown by collective actions in which individuals have joined and then the matters are subsequently decertified. In one instance, after the court decertified a FLSA collective action following a week of trial, there were over 2,000 cases transferred across the country, while in another, after decertification of a collective action, 29 separate multi-plaintiff actions were filed in various federal courts. 2 *The Fair Labor Standards Act*, *supra*, § 19.XI.A at 19-154 (discussing these two cases and citing others).

II. THE NEED FOR AGGREGATE FORMS OF ADJUDICATION UNDER THE *MT. CLEMENS'* HOLDINGS IS UNDERSCORED BY THE ENDEMIC NATURE OF WAGE HOUR VIOLATIONS.

A. Wage Theft is Pervasive, Especially in Low-Wage Industries.

The need for workers to be able to proceed collectively and efficiently to seek legally mandated pay is made urgent by the fact that wage theft continues to be a persistent problem. Wage theft, or the failure to pay workers the wages owed to them, is a nationwide problem cutting across business sectors and geographies. Employers fail to pay the minimum wage, force employees to work off the clock, fail to pay overtime, misclassify employees as contractors or managers to exempt them from worker protections; steal

tips; deduct money from employees' pay; and even fail to pay at all in many industries.

While additional national data on wage theft is needed, national and state-level studies paint a dire picture. A seminal 2009 study of 4,307 low-wage workers found that: (1) more than two-thirds experienced at least one pay-related violation in their previous work week, including a quarter of workers who were paid less than minimum wage; (2) three quarters of those surveyed were not paid proper overtime; (3) 57% did not receive paystubs in violation of state laws requiring documentation of wages, rates of pay, and hours worked; and (4) workers in low-wage industries in the three cities of New York, Chicago and Los Angeles lose over $56 million per week in unpaid wages.[12]

This study's findings have been confirmed by dozens of other surveys and studies showing what can only be described as staggering rates of wage and hour violations. The United States Department of Labor (DOL) has found that 50% of restaurants in Pittsburgh, 74% of day care centers in Georgia, 50% of nursing homes in St. Louis, 38% of hotels and motels in Reno, and 42% of group homes in Seattle violated wage and hour laws.[13] A recent DOL survey of

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[12] Annette Bernhardt, *et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009), available at *www.nelp.org/page/-brokenlaws/BrokenLawsReport2009pdf.*

[13] U.S. Department of Labor, *1999-2000 Report on Low-Wage Initiatives,* (Washington, DC: Employment Standards Administration, Wage and Hour Division, 2001), available at, *http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf.*

garment firms found violations in 89 percent of more than 1,600 cases in Southern California alone since 2009, leading to more than $15 million in recovered back wages for nearly 12,000 workers.[14] A survey of Current Population Survey data found that between 2005 and 2013, 16 percent of respondents were not paid properly in the last year, getting shorted about 26 percent of what they were owed.[15]

State wage theft studies in Iowa, North Carolina, Pennsylvania and New York are among myriad studies showing high rates in labor-intensive industries.[16] Sectors that are particularly prone to wage

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[14] U.S. Department of Labor, Wage and Hour Division Press Release. 2014, "Workers Face Millions in Unpaid Wages in Southern California Garment Industry." Available at, http://www.dol.gov/whd/media/press/*whdpressVB3.asp?pressdoc=Western/20141106.xml*.

[15] Daniel Galvin, *Wage Theft, Public Policy, and the Politics of Workers' Rights*, Northwestern University Institute for Policy Research Working Paper (September 2015), available at: http://www.ipr.northwestern.edu/publications/papers/2015/ipr-wp-15-08.html.

[16] For a summary of these and other surveys and research from across the country, see NELP's Summary of Research on Wage and Hour Violations in the United States, available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf. *See also*, Susan Miloser, Picking Pockets for Profit: Wage Theft and the Fair Labor Standards Act, Washington & Lee School of Law (2011), available at: http://www2.wlu.edu/documents/shepherd/academics/cap_11_miloser.pdf; Ruth Milkman, Ana Luz Gonzàlez & Peter Ikeler, *Wage and hour violations in urban labor markets: a comparison of Los Angeles, New York and Chicago*, 43 Indus. Rel. J. 378 (2012); Kimberly Bobo, WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID AND WHAT WE CAN DO ABOUT IT xi, 41 (Revised and Updated ed., 2011).

theft include, construction[17]; nursing homes,[18] agriculture, garment[19], nail salons,[20] restaurants, and janitorial.[21]

Detail of wage theft in the meat industry is particularly apt for this case. A DOL's investigation of the poultry industry found that *100%* of the 51 processors it had previously investigated continued not to pay for hours worked, and 65% of the plants had misclassified

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[17] New research published by the University of Massachusetts Amherst Labor Center shows that the illegal theft of workers' wages has reached an "epidemic" level in the residential construction industry in Massachusetts. *The Epidemic of Wage Theft in Residential Construction in Massachusetts*," Tom Juravich, Essie Ablavsky and Jake Williams (2015).

[18] In 2000, the DOL's Wage and Hour Division ("WHD") found that 60% of nursing homes and other personal care facilities failed to comply with minimum wage, overtime, and child labor laws. U.S. Dept. of Labor Wage and Hour Division, *Nursing Home 2000 Compliance Survey Fact Sheet*, available at http://www.dol.gov/esa/healthcare/surveys/printpage_nursing2000.htm.

[19] A DOL study of the Los Angeles garment industry found two-thirds of garment employers violated minimum wage or overtime laws, or both, in 2000. U.S. Dept. of Labor Wage and Hour Division News Release, *Only One-Third Of Southern California Garment Shops In Compliance With Federal Labor Laws*, (2000), available at http://www.dol.gov/esa/media/press/whd/sfwh112.htm.

[20] New employees were often required to pay a $100 deposit in order to work, trained for weeks without pay, and then paid as little as $30 per day for 12-hour days, six or seven days a week. Workers did not complain for fear of deportation, job loss, or abuse. Nir, Sarah Maslin,"The Price of Nice Nails." *The New York Times*, May 7, 2015.

[21] National Employment Law Project, *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, July 2013, available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf.

workers as exempt from FLSA.[22] A common practice was (as is at issue on this appeal) not paying employees for "donning and doffing" protective gear.[23]

B. Neither Agency Enforcement Nor Individual Claims are Adequate to Enforce Existing Wage and Hour Protections.

1. Federal and state DOLs cannot handle the magnitude of the problem alone.

Some assume that regulators alone can rectify wage theft. For instance, in the *Espenscheid* decision to which Petitioner cites, Judge Richard Posner passingly suggested that class counsel should have considered complaining to the DOL which, in a recent year, had recovered $225 million in back wages. 705 F.3d at 776.

But while it is true that employees can seek enforcement from federal or state departments of labor where available, these agencies are notoriously underfunded, and often do not provide the necessary relief.[24] Indeed, a 2009 GAO report investigating the

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[22] *Id.*; *see generally*, Rafael Jimenez, *Blood, Sweat and Fears: Worker's Rights in U.S. Meat and Poultry Plants*, HUMAN RIGHTS WATCH (2004) available at: http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear (last visited May 7, 2011); Tom Fritzsche, *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers*, Southern Poverty Law Center and Alabama Appleseed (2013).

[23] U.S. Dept. of Labor, *Poultry Processing Compliance Survey Fact Sheet*, Jan. 1, 2001, available at http://www.ufcw.org/your_industry/meatpacking_and_poultry/industry_news/dol_poultry. U.S. Department of La bor, *Report on Initiatives*, 21, 25 (2005).

[24] *See* Zach Schiller & Sarah DeCarlo, Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States* (2010); Weil, David, and Amanda Pyles. 2005. "Why Complain?: Complaints,

Wage & Hour Division's enforcement capacity and efficacy concluded, "the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn."[25] Further, between 1997 and 2007, the number of DOL inspectors fell by 20 percent – from 942 to 732 – as the number of covered workplaces rose.[26] Even with 250 additional wage and hour investigatory staff since added, the probability that any given employer would be investigated by Wage and Hour Division was still only 0.5 in 2012.[27]

Compliance, and the Problem of Enforcement in the U.S. Workplace." *Comp. Lab. L. & Pol'y. J.*27:59.

[25] U.S. Government Accountability Office, *Department of Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft* (2009); *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers: Hearings before the Committee on Education and Labor*, 111th Cong., 1st sess. (2009); GAO, *Better Use of Resources and Consistent Reporting Could Improve Compliance*, July 2008, available at: http://www.gao.gov/new.items/d08962t.pdf.

[26] Jessica Scheider, *To Better Protect Workers, We Need More Wage Inspectors and Stronger Enforcement*, Center for Effective Government, 2015; available at: http://www.foreffectivegov.org/blog/better-protect-workers-we-need-more-wage-inspectors-and-stronger-enforcement; Weil,*supra*, note 24. "Why Complain?: Complaints, Compliance, and the Problem of Enforcement in the Us Workplace." *Comp. Lab. L. & Pol'y. J.*27:59.

[27] Scheider, *supra*, note 26. State departments of labor have even less capacity. State investigators with any connection to wage and hour enforcement number less than 1,000 nationwide, and most of those are responsible for more than one workplace law. Five states lack a state wage and hour division of any kind, meaning that workers in those states can only seek recourse at the federal DOL. *See* Zach Schiller & Sarah DeCarlo, Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States* (2010).

And, the $225 million figure Judge Posner cited is a literally drop in the bucket compared to actual losses. To cite one of the studies summarized above, a three-city study of workers in low-wage industries found that in any given week, the average loss per worker over the course of a year was $2,634 (out of total earnings of $17,616). This meant that workers in low-wage industries in New York, Chicago, and Los Angeles alone lost nearly $3 billion a year.[28] The total cost of wage theft to our economy or to the government (in lost tax revenues) is enormous.

2. Individual worker actions are an inadequate means to enforce the wage and hour laws.

Relying on individual private lawsuits to address wage and hour violations is also insufficient in light of the barriers workers face to pursuing individual claims. Employers in low-wage jobs can deprive their employees of individually small but cumulatively substantial wages. *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (12-14 minutes spent changing clothes and showering and few minutes spent walking between locker rooms and production area are compensable under federal law); *see also, e.g., Chase v. AIMCO Properties, L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("individual wage and hour claims might be too small in dollar terms to support a litigation effort"); *Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (class members are not likely to file individual suits because of the small size of their claims).

Compounding the small individual recovery problem is that, without the protection of aggregate lit-

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[28] Bernhardt, *supra*, note 12.

igation, individual workers are less likely to come forward to start or join a suit to complain of improper pay or hours due to fear of retaliation.[29] *See Shahriar v. Smith & Wollensky Rest. Group*, 659 F.3d 234, 244 (2d Cir. 2011) ("an employee fearful of retaliation or of being 'blackballed' in his or her industry may choose not to assert his or her FLSA rights"). If the workers are immigrants, the barriers are even more daunting inasmuch as employers may try to intimidate or scare immigrant plaintiffs by seeking information regarding the plaintiff's immigration status. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2003) (granting a protective order barring discovery into plaintiff's immigration status because it could "chill the plaintiffs' willingness and ability to bring civil rights claims.").[30]

C. Many Workers Are Not Getting Paid Due To Improper Employer Recordkeeping.

Another obstacle for workers experiencing wage theft is – consistent with the Courts' concern in *Mt. Clemens* – the unwillingness of some employers to keep records of hours and pay. Section 11 of the FLSA requires employers to keep records of the hours worked by each employee, the amount of pay that each worker received for regular hours and overtime hours, and the basis upon which a worker's reg-

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[29] Weil, *supra*, note 24 (studies suggest that, "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights.").

[30] Preserving the collective action mechanism is equally important to preserving plaintiffs' ability to bring collective actions under the Age Discrimination in Employment Act, which incorporates section 216(b) of the FLSA. 29 U.S.C. § 626(b); *see also Hoffman-La Roche, Inc.*, 493 U.S. at 167-68 (1989) (discussing collective actions under ADEA).

ular and any overtime hours are compensated. 29 U.S.C. § 211; *see also* 29 CFR 516.2. Thirty years ago, a GAO report found that employer non-compliance with the record keeping and other provisions of FLSA was "a serious and continuing problem" and that "many employers willfully violated the act."[31] Employer lack of recordkeeping was singled out, as were "willful" violations, defined as those of repeat offenders, or by employers who had already been investigated as Tyson was here.[32] As the studies discussed above demonstrate, the problem has not improved in the decades since.

Employers of low-wage workers in particular are significantly less likely to provide their employees with information about their hours and pay, compounding proof problems if wage theft occurs. Of the workers surveyed in the *Broken Laws* three-city

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[31] David Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Workers Rights?* 20 Berkeley J. Emp. & Lab. L. 74, 106 (1999).

[32] As one commentator notes, the report showed:

> An initial DOL investigation should have been sufficient to clear up misunderstandings about the law. In samples of local and regional office cases, between 21 and 37% of offending employers had at least one prior violation. Furthermore, high percentages (ranging from 80 to 98% in the two samples) of the repeat violations involved the same provisions of the act...the GAO found that "record keeping violations are extensive." Compliance officers reported that 49% of cases closed in June 1979 that had monetary findings contained record-keeping violations.

Walsh, *supra*, at 106-07.

study, 38 percent did not receive pay documentation in the last pay period.[33]

Without records, workers cannot track wages or document violations. Not holding repeat offenders that refuse to keep records like Petitioner accountable rewards head-in-the-sand violations of this Country's wage and hour laws and deprives workers of the pay for which they worked.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

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[33] National Employment Law Project, *Immigration Status and Pay Documentation Fact Sheet* (2013), available at: http://nelp.3cdn.net/7fa4b3cbfa64242b14_sim6ib20q.pdf.

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent the injured victims of misconduct. American Association for Justice members often represent personal injury plaintiffs as well as those whose civil rights and consumer rights have been violated. Often, the compensation sought by many plaintiffs with similar claims may not justify the expense and use of judicial resources in litigating individual cases. AAJ members have made use of class actions under Federal Rule of Civil Procedure 23 as an efficient means for achieving justice in those circumstances.

This is such a case, and AAJ believes that the court below decided it correctly. AAJ is concerned that Petitioner's contention that a class may not be certified if some absent members were not injured places a heavy and unnecessary burden on class action plaintiffs that is inconsistent with the aims of Rule 23.[1]

SUMMARY OF THE ARGUMENT

1. The Second Question, whether a class action may be certified when absent members of the

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

class were not injured and not entitled to any damages, is not properly presented. The court below did not address the issue, but its ruling is consistent with the prevailing rule in federal courts that Article III does not require plaintiffs to prove that every absent class member was injured in fact.

In this case, however, the Complaint alleged that all members of the class did in fact suffer injury. Plaintiffs alleged that all class members were hourly employees paid under Tyson's "gang-time system," which undercompensated them for donning and doffing personal protective equipment and other activities. Those allegations that all members of the class suffered financial harm due were sufficient for Article III standing, despite the fact that plaintiffs at trial only sought recovery of uncompensated overtime.

Article III standing does not require plaintiffs to prove the merits of their claims at the outset of the litigation. Allegations suffice. If plaintiffs fail to prove at trial that they are entitled to compensation, action does not cease to be a "case or controversy." Indeed, the alleged harm or injury for standing purposes need not state a cause of action under federal or state law or support a compensable claim for damages.

Because all members of the class could allege injury in fact, this case does not properly present the question whether a class with members lacking Article III standing may be certified. This Court has declined to decide questions of constitutional law unnecessarily or to formulate rules of constitutional law more broadly than required by the precise facts of the case before the Court. The Court should accordingly dismiss the writ as improvidently granted with regard to the second question presented.

2. The Court should also decline to address the second question presented because Petitioner lacks standing to challenge certification on the ground that uninjured class members increased the size of, or will share in, the jury's damage award.

Plaintiffs did not ask the jury to award all the unpaid wages described in their Complaint. They limited their claim to the amount of overtime that Tyson failed to pay to the class as a result of its gang-time system. Plaintiffs' expert testified that she had identified 212 workers who would not have been eligible for overtime because they would not have worked over 40 hours per week, even if credited with time donning and doffing protective equipment. She further testified that she had excluded those workers from her calculation of the total uncompensated overtime. Indeed, she testified that, under instructions from plaintiffs' counsel, she had excluded all individual claims under $50.

It is clear from the record, then, that the claims of all workers who suffered no loss of overtime were excluded from the calculation of damages sought from the jury. Excluding those persons from the certified class would not have affected in any way the size of the damage award. Petitioner lacks standing to challenge the certification of the class on that basis.

Nor does Petitioner have standing to challenge the eventual allocation of the aggregate damage award among the members of the class. By seeking an aggregate verdict, Petitioner waived any defenses to individual claims or the right to have the jury determine individual damages. The allocation of the award will have no effect on Petitioner's liability.

This Court should therefore decline to reach the second question and dismiss the writ as improvidently granted as to that question.

3. If this Court addresses the second question presented, the Court should affirm. The decision below conforms to the position of every federal circuit to consider the question: Where the named class representative has standing, Article III does not require that plaintiffs also prove that every absent class member has suffered injury in fact. Rather, federal courts ensure that class actions present a justiciable case or controversy by careful application of the Rule 23 prerequisites for class actions. Class certification issues are logically antecedent to Article III issues and make additional proof of standing unnecessary. None of the decisions cited by Petitioner require proof of standing of absent class members as a condition of certification.

This position also comports with this Court's precedents in a variety of circumstances involving representative actions. In class actions, for example, this Court has focused on the standing of the named plaintiffs. Similarly in cases involving multiple plaintiffs, this Court has held that Article III standing of at least one named plaintiff is sufficient.

Careful application of the Rule 23 prerequisites for class certification provides a fairer and more practical guarantee of justiciability than requiring that plaintiffs prove injury in fact of each absent class member. Requiring plaintiffs to prove the merits of their claims at the outset of the litigation is impractical and undermines the economies of the class action device. Nor does such a requirement offer any legitimate benefits. Plaintiffs who succeed in

proving the merits of their claims will have little incentive to settle for less than their full demand, increased by the added costs of proof. Plaintiffs who do not succeed may bring wasteful repetitive individual actions. But plaintiffs with modest claims will more likely abandon their legitimate claims altogether. Evasion of accountability by unnecessarily increasing the cost of obtaining justice is not a legitimate goal.

All the tools necessary for ensuring that class actions present a justiciable case or controversy are already in the hands of the district courts through careful application of Rule 23. One such tool is the authority to tailor the class definition to ensure that common issues of law or fact predominate and class representatives adequately represent the class. If the class appears to include persons who were not injured, the district court can require that the class definition be revised and narrowed. In appropriate circumstances, a court may create subclasses or ask the factfinder to return a class-wide recovery that can later be allocated in a fair and practical way. Or a court might try only liability issues in common, leaving individualized damage assessments for a later stage. Rule 23 also allows the court to revisit and revise its decision in light of new developments or evidence.

Petitioner's proposal provides none of these benefits, undermines the efficient resolution of class actions, and will burden access to the federal courts for many with legitimate, though modest claims.

ARGUMENT

I. The Article III Standing of Absent Class Members Is Not at Issue Where Plaintiffs Alleged Injury to All Members of the Class.

AAJ respectfully addresses this Court with respect to the Second Question Presented: Whether a class action may be certified "when the class contains hundreds of members who were not injured and have no legal right to any damages."

The court below did not address this issue directly, pointing out that "at Tyson's request, the jury was instructed, 'Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'" *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 798 (8th Cir. 2014).[2] However, the court's affirmance conforms to the prevailing rule in federal courts that "[a] class action can be maintained by one class representative with proper standing," 2 William B. Rubenstein, Albert Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 2:8 (5th ed. 2011), and that Article III does not require a showing that each absent class member also has standing. *Id.* at § 2:1. *See also* 5 J. Moore *et al.*, *Moore's Federal Practice* § 26.63[1][b], at 23-304 (3d. ed. 2014) ("[A]t least one named class representative must have Article III standing to raise each [class] claim.").

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[2] This Court "ordinarily do[es] not decide in the first instance issues not decided below" where the Court is "without the benefit of thorough lower court opinions to guide our analysis of the merits." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012).

Tyson petitioned this Court for a Writ of Certiorari, arguing in part that the district court violated Article III and exceeded the limits of federal court jurisdiction by certifying a class that included a significant number of members who had suffered no injury in fact and thus had no standing to bring this action. Pet. 25 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Petitioner further contended that the circuits are deeply divided on whether such a class may be certified. *Id.* 26-29 & n.6. This Court granted the petition, including its second question presented. *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015).

AAJ suggests that this question is not properly presented in this case. Plaintiffs alleged that all members of the class were injured because they were not fully compensated for work activities. To the extent that the standing of absent class members who were not injured is of substantial importance, the Court should await a case in which that question is properly presented.

A. Plaintiffs' complaint alleged that all members of the class were injured in fact.

Plaintiffs brought this action on behalf of hourly workers in two areas of Tyson's pork processing plant in Storm Lake, Iowa. Although the workers punch time clocks upon arrival and departure, they are not paid for all the time they are in the plant. Instead, as Petitioner states, "Tyson's 'gang-time' system compensates them from the time the first piece of product passes their work stations until the last piece of product passes." Br. of Petitioner 5-6. In addition, Tyson paid workers four

minutes per day of "K-Code time" during 2004 to 2007 as compensation "for donning/doffing-related activities." From 2007 to 2010, Tyson paid four to eight minutes per day for K-Code time, limited to knife-wielding employees. *Id.*

Plaintiffs contended that this "gang-time system" failed to fully compensate them for their work and brought this action for "unpaid wages and unpaid overtime wages" and other relief under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* and under Iowa law. Original Class Action and Representative Action Complaint ("Compl.") ¶¶ 1 & 2, J.A. 28. Specifically, Plaintiffs alleged:

> Tyson has failed to pay Plaintiffs their minimum hourly rate of pay for all hours of work they performed *in addition to* overtime as required by federal law. The uncompensated time includes, but is not limited to, time spent preparing, donning, doffing, obtaining and sanitizing sanitary and safety equipment and clothing, obtaining tools, equipment and supplies necessary for the performance of their work, "working" steels and all other activities in connection with these job functions, and walking between work sites after the first compensable work activity and before the last compensable work activity.

Id. at ¶ 4, J.A. 28-29 (emphasis added). *See also id.* at ¶¶ 34-39, J.A. 37-38 (detailing the activities which plaintiffs alleged to be uncompensated work). Plaintiffs further alleged, "Defendant Tyson has

intentionally refused to pay all wages due as set forth in the preceding paragraphs of this Complaint to Plaintiffs and class members." *Id.* at ¶ 51, J.A. 41.

The injury described in the Complaint was not limited to unpaid overtime compensation. All members of the class were paid under the gang-time system. If the specified activities are found to be "work" under the FLSA, as alleged, then all members of the class were deprived of "their minimum hourly rate of pay for all hours of work they performed in addition to overtime as required by federal law." *Id.* at ¶ 4, J.A. 28-29.[3]

B. Injury-in-fact does not require proof of compensable claim at the outset of litigation.

Petitioner appears to concede that all class members may have been under-compensated, but insists that "evidence at trial showed that some class members did not work overtime and would receive no FLSA damages *even if Tyson under-compensated their donning, doffing, and walking.*" Pet. 13 & Br. of Petitioner 15 (emphasis added). On that basis, Petitioner contends that certification was improper because some members lacked any injury, as required by Article III. Pet. 30; Br. of Petitioner 44-45.

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[3] *See Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3793962, at *3 (N.D. Iowa Aug. 25, 2011) ("If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs.").

Petitioner's argument fails for two reasons. First, Article III does not demand that a plaintiff win his case on the merits at the certification stage. Allegations that each member of the class was affected financially by Defendant's conduct, as Plaintiffs alleged here, suffice. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("[A]llegations of lost sales and damage to its business reputation give [plaintiff] standing under Article III."); *In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014)), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014) ("Article III does not require a showing that an absent class member can prove his case at the Rule 23 stage, so long as the absent class member can allege standing.") (internal quotations omitted); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) ("To the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'").

The fact that plaintiffs might not succeed in proving by the evidence that they are entitled to compensation for their concrete injury—or even that they have stated a valid cause of action—does not deprive them of standing or the federal court of subject matter jurisdiction. That analysis "goes to the merits and not to statutory standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998).[4]

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[4] This Court has indicated that in limited circumstances, it may be necessary for a court "to probe behind the pleadings" and inquire into the merits of the allegations "before coming to rest on the certification" question. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). However, that inquiry is limited "to determining

Thus, "[j]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Id.* at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). As Judge Posner has observed, "when a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction [I]nstead the suit is dismissed on the merits." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).

Indeed, the injury alleged need not constitute a compensable claim. This Court, for example, has repeatedly held that invasion of an individual's noneconomic aesthetic or recreational interests may result in an injury for Article III standing purposes, regardless of whether the injury would result in compensable damages. *See, e.g, Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a

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whether the Rule 23 prerequisites for class certification are satisfied." and "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). The determination of Article III standing "in no way depends on the merits" of the plaintiffs' claims. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (Standing "goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case.").

cognizable interest for purposes of standing."); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (Article III injury in fact could be established by allegations that "aesthetic and recreational values of the area will be lessened by the [proposed] highway and ski resort"); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (Injury in fact "at times, may reflect aesthetic, conservational, and recreational as well as economic values.").

Similarly, exposure to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact requirement "even though exposure alone may not provide sufficient ground for a claim under state tort law." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). *See also Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir. 2005) (the increased risk that a faulty medical device may malfunction constituted a sufficient injury-in-fact even though the class members' own devices had not malfunctioned and may have actually been beneficial).

Consequently, it is not uncommon for federal courts to determine that a plaintiff had alleged injury-in-fact supporting Article III standing, but had no compensable injury. *See, e.g., Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 637-40 (7th Cir. 2007) (Online bank customers whose personal information was hacked had standing to sue the bank for allegedly lax security measures, but failed to establish compensable injury); *Bediako v. Am. Honda Fin. Corp.*, 537 Fed. Appx. 183, 188 n.4 (4th Cir. 2013) (Plaintiff "has alleged an injury-in-fact sufficient to provide standing even if, as we have concluded, the claim fails on the merits.").

In this case, the allegations of the Complaint defined a class whose members were undercompensated due to Tyson's gang-time system. The fact that plaintiffs subsequently decided to seek only unpaid overtime or that the evidence showed some class members could not prove they were owed overtime did not affect their Article III standing. This case does not, therefore, properly present the question whether a class containing members lacking such standing may be certified.

This Court has developed "for its own governance in cases confessedly within its jurisdiction," two rules which it has adhered to regarding issues of constitutional law:

> [O]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885), *quoted in Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

AAJ suggests, therefore, that the writ be dismissed as improvidently granted with respect to the second question. *See, e.g., City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (dismissing writ as improvidently granted as to one of two questions); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001) (similar).

II. Petitioner Lacks Standing to Challenge Class Certification on the Basis of the Aggregate Verdict in this Case.

A. Petitioner was protected from any possibility of paying compensation to class members who suffered no loss of overtime pay.

Plaintiffs did not ask the jury to award all the unpaid wages described in their Original Complaint. Instead, they limited their claim to the amount of overtime that Tyson failed to pay to the class as a result of its gang-time system. Briefly, Plaintiffs contended that if Tyson had properly credited them with the full time spent donning and doffing personal protective equipment and other activities, their total hours worked would have exceeded 40 hours per week. Under the FLSA, they were entitled to compensation for such time "at a rate not less than one and one-half times the regular rate." 29 U.S.C. § 207(a)(1).

At trial, Plaintiff's expert, Dr. Fox, calculated the average time spent performing uncompensated work activities, subtracted the K-code time received, and calculated the total uncompensated overtime owed to the class. Dr. Fox testified that the total amount owed to the Rule 23 class was $6,686,082.36. Br. of Petitioner 13.

Tyson has called the Court's attention to Dr. Fox's trial testimony that "the class included over 212 members who suffered no injury at all [because] even adding the estimated time did not result in those employees working over 40 hours in a single week." Pet. 11. Tyson argued unsuccessfully to the Eighth Circuit that decertification was necessary "because

evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." *Id.* at 13. Tyson then sought this Court's review on the ground that the court below improperly certified the class to "compensate individuals who suffered no injury, lack Article III standing, and are entitled to zero damages." *Id.* at 30.

Having won review by this Court, Petitioner appears to deemphasize its Article III standing argument in favor of one of fairness:

> [T]he fact that a single, named class plaintiff has Article III standing—and that a court can therefore adjudicate a case or controversy between that plaintiff and the defendant—does not establish that the court has authority to award damages to class members who cannot prove injury.

Br. of Petitioner 46. Petitioner further complains that by certifying a class with uninjured employees, "the district court would force Tyson to pay employees whom it had fully compensated." *Id.* at 16. Moreover, "requiring defendants to pay damages to persons who cannot establish injury is not merely unfair and 'undesirable,' it is beyond the authority of federal courts." *Id.* at 47-48.

In contrast to the Petition's advocacy in favor of a rule that "no class may be certified that contains members lacking Article III standing," Pet. 28 (quoting *Denney*, 443 F.3d at 264), Petitioner now states:

> The fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.

Br. of Petitioner 49.[5]

However, where Plaintiffs "cannot offer such proof," Petitioner proposes "they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment" so that they do not contribute to, or share in, the damage award. *Id.* Petitioner proposes that Rule 23 should require that class plaintiffs demonstrate a "fail-safe" and "administratively feasible and constitutionally valid way for culling the uninjured class members . *before* the class is certified." *Id.* at 49 & 50 (emphasis in original).

AAJ strenuously disagrees with imposing such a heavy and unfair burden on plaintiffs at the outset of a class action. However, the question is not properly presented in this case. The record clearly shows that Tyson was not at all affected by the presence of uninjured workers in the class or the absence of a "culling" mechanism. The evidence placed before the jury reflected only the claims of those workers who were owed overtime compensation. There was no possibility that Tyson would be forced to pay workers

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[5] That Petitioner has altered its position on the second question supports the dismissal of the writ as improvidently granted with respect to that question. *See Sheehan*, 135 S. Ct. at 1778-79 (Scalia, J., concurring in part).

it had already fully compensated. Tyson has no standing to challenge class certification or its affirmance on that ground.

Dr. Fox testified that, using Tyson's records, she had identified 212 workers who would not be entitled to overtime pay, even if credited with the additional time calculated by plaintiffs' expert Dr. Mericle. Although those workers remained in the class, Dr. Fox excluded them from her calculation of the total overtime owed to the class. Indeed, as Dr. Fox explained in her testimony, under instructions from counsel she excluded all those class members whose unpaid overtime was less than $50:

> Q. [by Mr. Mueller] And let me show you just one page of a many-page exhibit just so we are on the same page. This is page one for the FLSA class. It gives person by person and amount, correct?
>
> A. Correct.
>
> Q. And for example, the first person, Jose D. Acevedo, $220, then it goes on up, correct?
>
> A. Correct.
>
> Q. For that particular group did you limit them to persons that made—that their backpay was of a certain magnitude or amount?
>
> A. Yes, damages were only awarded if they would receive at least $50.

Q. At least $50. . . . So from this work you did you were able to determine for particular people what their loss was?

A. Yes.

* * *

Q. Now, taking the total amount, not the individual amounts, but the total amount, when you put all the individuals that are eligible together for the Iowa class, what backpay did you calculate?

A. Six point—$6,686,082.36.

Q. How many cents?

A. 36.

Q. All right. Let me show you the summary—what is the next number, 345—table. Are these the results of your calculation based on the method you told us about?

A. Yes.

Q. All right. And you—I notice that you said number in the Iowa class is 2,850. Why is that less than 3,344?

A. Because that—*that subtracts off the people that would not get any because they would have received less than $50.*

J.A. 409-10 (emphasis added).

Plaintiffs' Exhibit 345, referred to by counsel questioning Dr. Fox, summarized for the jury Dr. Fox's estimate of damages due to the Rule 23 class ($6,686,082.36) and for the collective action ($1,611,702.44) for uncompensated work time. Plaintiffs' Ex. 345, filed Sept. 9, 2011, J.A. 139. The exhibit states, as Dr. Fox testified, "Damages were eliminated for individuals whose damages amount was less than $50." *Id.*

Shortly thereafter in her direct examination, Dr. Fox again made clear that all class members who she calculated as having been undercompensated by $50 or less, including 212 who were owed no overtime at all, were identified and excluded from her calculation of the unpaid overtime due to the class.

> Q. I want to pull up Defendant's 2272 which is her Deposition Exhibit 54.
>
> Q. So this is your original list that I resorted before you took out people under $50, correct?
>
> A. That was—that was after—this is after my report, but before I removed $50?
>
> Q. That's correct.
>
> A. Okay.
>
> * * *
>
> Q. Let's go down your original list before Mr. Wiggins [1302] told you to cut out the people under $50 and I think we can clarify that my question about how many

> people would have gotten zero even before Mr. Wiggins told you to cut them out, let's go down to the first person who gets anything. . . Do you see at line 213 we see Akur Guang?
>
> A. Yes.
>
> Q. That means the first row is—numbered row is the header, correct?
>
> A. That's correct.
>
> Q. That means the first 212 people on your list -
>
> A. Yes.
>
> Q. they would have gotten zero even assuming all of Dr. Mericle's numbers and everything else the Plaintiffs say, right? Correct?
>
> A. That's correct. It would not have been enough to kick them into overtime.

J.A. 414-15.

Petitioner is not correct in arguing that "Plaintiffs have [not] proposed any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured." Br. of Petitioner 53. To the contrary, Dr. Fox testified she was able to identify by name all the 212 employees who were not deprived of overtime pay. In addition, the jury heard Dr. Fox testify that the $6,686,082.36 they were asked to award to the class represented the

total of the individual claims of those class members who were underpaid by $50 or more. The jury also received Plaintiff's Exhibit 345, which contained the same information.

Class members who were owed no overtime added nothing to the amount asked of the jury. Nor would any "culling" mechanism have altered the amount of Tyson's liability.

B. Petitioner lacks standing to challenge the allocation of aggregate damages among class members.

Petitioner further speculates that "each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Br. of Petitioner 53. There is no basis for such an assertion. As Petitioner acknowledges, the district court may entertain a motion by plaintiffs to allocate the aggregate verdict. *Id.* But Petitioner asserts that any such attempt "would raise a host of due process concerns and violate the Seventh Amendment's command . . ." *Id.* at 53.

Not at all. Every member of the class had standing, and the aggregate verdict for the whole class, which Petitioner requested, represented the total of those members of the class who were uncompensated for $50 of overtime or more. Regardless of how the class, or the district court on motion of the class, may allocate the verdict among the members of the class, Tyson's liability for the judgment will not change. To the extent that Tyson had the right to contest the amount owed to any individual class member, Tyson waived that right by

seeking a jury determination of only the aggregate amount of unpaid overtime owed to the class.

How the jury's award in this case shall be divided among the class members remains to be determined. It is certain, however, that the allocation cannot affect the amount of Tyson's liability. Tyson therefore has no standing to contest class certification on that ground. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (Defendant "has no interest in the method of distributing the aggregate damages award among the class members."); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves."); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.").

Because the record shows there was no chance that the jury's award included the claims of uninjured class members, and because the allocation of the award among the class members will have no effect on Tyson's liability to the class, Tyson lacks standing to challenge the certification of the class as including workers with no overtime claims.

Because those arguments formed the basis for Tyson's Petition, AAJ suggests that the writ be dismissed as improvidently granted as to the second question.

III. The Court Below Properly Held That Where a Purported Class Satisfies the Requirements of Rule 23(a), No Further Proof of Standing on the Part of Absent Class Members Is Required.

A. Federal courts agree that plaintiffs need not prove that absent class members have Article III standing as a separate requirement for class certification.

If this Court addresses the second question presented, AAJ urges the Court to affirm.

The decision below conforms to the prevailing rule that "only the named plaintiff must demonstrate standing to assert the claims (including injury in fact), not the absent class members. Individual class members do not need to submit evidence of personal standing." 1 *McLaughlin on Class Actions* § 4:28 (11th ed. 2014). This is not to say that class actions are exempt from the strictures of Article III. Rather, federal courts ensure justiciability by close inquiry into the prerequisites for a class action set out in Rule 23(a), particularly the identification of common issues of law or fact, the typicality of the named plaintiffs' claims to the class's claims, and the adequacy of representation by the named plaintiffs. Fed. R. Civ. P. 23(a)(2)-(4). *See also* 7AA Charles A. Wright *et al.*, *Fed. Prac. & Proc. Civ.* § 1785.1 (3d ed. 2014) ("[T]he question whether [a class representative] may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

At the outset, AAJ notes that, contrary to Petitioner's contention, the circuit courts are not in disagreement on this point. *See* Pet. 26. The Third Circuit recently held that "unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015). As Petitioner has noted, the Seventh, First, and Tenth Circuits are in agreement. *See* Pet. 26-27 (citing *Kohen*, 571 F.3d 672; *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); and *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010)). *See also Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct" (citing *Kohen*)); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("[F]ederal courts do not require that each member of a class submit evidence of personal standing."); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements.").

It is important to note that these courts do not ignore "the irreducible constitutional minimum of standing" under the case-or-controversy requirement of Article III. *Lujan*, 504 U.S. at 560. *See, e.g., Kohen*, 571 F.3d at 676 ("It is true that injury is a prerequisite to standing."); *Nexium*, 777 F.3d at 31-32 (same). However, federal courts comply with this requirement by ensuring that the purported class conforms to the prerequisites of Federal Rule of Civil Procedure 23. *See Kohen*, 571 F.3d at 677-79 (predominance of common issues and adequacy of representation);

Nexium, 777 F.3d at 25, 30-31 (commonality and predominance); *Stricklin*, 594 F.3d at 1196-97 (commonality); *Avritt*, 615 F.3d at 1034 (class definition); *Stearns*, 655 F.3d at 1020-21 (predominance).

This approach conforms to this Court's instruction that "class certification issues are dispositive" and are "logically antecedent to the existence of any Article III issues." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999). Moreover, if the district court concludes that the class meets the Rule 23 prerequisites, the certified class acquires a separate legal status, making additional proof of standing of each absent member unnecessary. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975). As the Third Circuit correctly stated, "a properly formulated Rule 23 class should not raise standing issues." *Neale*, 794 F.3d at 368.

The cases cited by Petitioner show no disagreement among the circuits on this issue. *See* Pet. 28-29. In *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), Petitioner's chief exhibit in showing a split in the circuits, the Second Circuit affirmed the district court's class certification in a lawsuit against professional tax advisors for fraudulent tax counseling, rejecting the objection that some class members had not been assessed tax penalties and therefore lacked Article III standing. *Id.* at 259. The court explained: "We do not require that each member of a class submit evidence of personal standing. Once it is ascertained that there is a named plaintiff with the requisite standing there is no requirement that the members of the class also

proffer such evidence."). *Id.* at 263-64 (internal quotations omitted).

The Ninth Circuit in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), *cited in* Pet. 28, held that that plaintiffs' allegations that "class members were relieved of their money" by Honda constituted injury-in-fact without individualized proof for each member of the class. *Id.* at 595 (citing *Stearns*, 655 F.3d at 1021).

The District of Columbia Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), did not address Article III standing of absent class members at all. Rather, the court found that the statistical model proffered by freight customers alleging that defendant railroads engaged in a price-fixing conspiracy did not provide reliable class-wide proof of damages as required by this Court in *Comcast*, 133 S. Ct. at 1432. 725 F.3d at 252-53.

In short, all federal circuits that have addressed the issue have held that where a class representative has standing and has alleged harm to the class, plaintiffs need not also prove that every member of the class was in fact injured. Petitioner assigns error to the failure of the court of appeals to order decertification of the class after trial evidence indicated that members of the class have no compensable claim. But Petitioner has offered no case in which a class has been decertified on that basis.

B. The decision below comports with this Court's precedents regarding representative actions.

Tyson's argument is largely premised on the proposition that a class action is no more than a collection of individual cases tried at once. *See* Br. of Petitioner 46. For standing purposes, however, "the key" is that "a class action is a *representative* action brought by a named plaintiff or plaintiffs." *Neale*, 794 F.3d at 364. This Court in a variety of contexts has placed the focus on the Article III standing of the named plaintiff in representative actions.

In a class action, for example, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendant[ ], none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The named class plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Justice Souter suggested that "there is no apparent question that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction." *Lewis v. Casey*, 518 U.S. 343, 394 (1996) (Souter, J., concurring in part, dissenting in part). Instead, whether "the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." *Id.* at 395-96.

In cases involving multiple plaintiffs, this Court has held that "in all standing inquiries, the critical question is whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne v. Flores*, 557 U.S. 433, 445 (2009). Thus, where "we have at least one individual plaintiff who has demonstrated standing . . . we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), this Court expressed agreement with the lower court's view that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Id.* at 52-53 n.2. Likewise, in *Bowsher v. Synar*, 478 U.S. 714 (1986), an action challenging federal spending cuts, the fact that a named union member "will sustain injury by not receiving a scheduled increase in benefits," was sufficient to confer standing under Article III. *Id.* at 721 "We therefore need not consider the standing issue as to the Union or Members of Congress." *Id.*

In the situation were the claim of a class representative has become moot this Court has recognized that the question is not whether suit can proceed on the standing of some unnamed members of the class, but whether "the named representative [can continue] to "fairly and adequately protect the interests of the class." *Sosna*, 419 U.S. at 403 (quoting Fed. Rule Civ. P. 23(a)). *See also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404-06 (1980) (same).

Clearly the position taken by the Eighth Circuit and by every circuit court to address the issue

comports with this Court's view in representative actions that a case is justiciable when at least named one named plaintiff has Article III standing.

C. Careful application of the Rule 23 prerequisites for class certification is a fairer and more pragmatic guarantee of justiciability than requiring proof of injury of each absent class member.

Petitioner proposes that class certification be granted only when, in addition to complying with Rule 23, plaintiffs also prove that each absent member of the class suffered injury-in-fact. Br. of Petitioner 44. Petitioner offers no practical means of implementing such a requirement; it merely insists that plaintiff should bear the burden of proving at every stage of the litigation that the class contains no members who will be shown at trial to be uninjured or provide a mechanism to "cull" those class members. *Id.* at 50.

As Judge Posner has pointed out, when plaintiffs seek certification, "many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen*, 571 F.3d at 677. In addition, as the Fifth Circuit stated, "we are aware of [no authority] that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification and settlement approval under Rule 23." *In re Deepwater Horizon*, 739 F.3d at 805-06. The court also observed that in scrutinizing plaintiffs' proof of the merits of the absent members' claims on motion to certify, "it would be premature and improper for a court to apply evidentiary standards

corresponding to those later stages of litigation." *Id.* at 807.

Indeed, requiring class plaintiffs to prove their case on the merits at the outset of the litigation is "putting the cart before the horse in [a] way [that] would vitiate the economies of class action procedure" *Kohen*, 571 F.3d at 676. The purpose of class actions, this Court has observed, is to save "the resources of both the courts and the parties by permitting an issue *potentially* affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (emphasis added). Placing the added burden on litigants to establish that the defendant's alleged misconduct actually injured each individual absent class member prior to discovery "would make no practical sense," *In re Deepwater Horizon*, 739 F.3d at 807, and "is inconsistent with the nature of an action under Rule 23." *Neale*, 794 F.3d at 367.

Indeed, it is difficult to discern what legitimate benefits might flow from Petitioner's proposal. If plaintiffs succeed in presenting sufficient evidence to prove injury to all class members due to defendant's alleged misconduct, there remains little incentive to settle for less than plaintiffs' full demand. *In re Deepwater Horizon*, 739 F.3d at 807. Petitioner's proposal accomplishes little more than adding to the transaction costs that plaintiffs' counsel must seek to recoup in any settlement. The obvious result will be fewer and more costly settlements. *See In re Deepwater Horizon*, 739 F.3d at 807 (noting the "overriding public interest in favor of settlement" of class action suits).

If, on the other hand, the court denies certification because plaintiffs cannot prove that the evidence at trial will show that all class members suffered compensable injury, the "economies of class action procedure" are lost entirely. Petitioner's proposal could result in numerous individual, nearly identical actions in which the defendant can litigate its defenses to individual claims. *See* Br. of Petitioner 47. But the far more likely result is that few if any of those who have been denied their federal statutory right to compensation for work will bring such an action. The avoidance of accountability by increasing the cost of obtaining justice is not a legitimate benefit. After all, the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc.*, 521 U.S. at 617 (internal quotation omitted).

Moreover, federal courts already rely on the prerequisites set out in Rule 23(a) to ensure that class actions present justiciable cases or controversies. At the same time, careful application of the rule provides practical application and flexibility to "achieve economies of time, effort, and expense, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615 (quoting Fed. R. Civ. P. 23, 1966 Advisory Comm. Note).

An important tool in this regard is the district court's authority to tailor the class definition to ensure that common issues of law or fact predominate and class representatives adequately represent the class. Thus, "if it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant . this would be a compelling

reason to require that [the class definition] be narrowed," rather than deny certification. *Kohen*, 571 F.3d at 677-78. In this case, for example, the district court limited the class of hourly workers to include only those who were paid under the gang-time system, excluding those who could not have been undercompensated even if the Complaint's allegations proved true. *Bouaphakeo*, 564 F. Supp. 2d at 905.

In some circumstances, as in the present case, the court may determine that common issue favor asking the factfinder to award a single recovery to a class as a whole and then allocate that recovery in some practical way. *See, e.g., Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-54 (7th Cir. 1976).

If, as the litigation unfolds, differences among class members suggest that some claims might not be compensable, "the district judge might decide to create subclasses." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

In still other situations, the court may ascertain that only liability issues predominate, leaving damages for later individualized determinations. *E.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008); *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139, 141 (2d Cir. 2001). In some such cases, Judge Posner points out, if the parties could "agree on a schedule of damages . . . the hearings would be brief; indeed the case would probably be quickly settled." *Butler*, 727 F.3d at 798.

Finally, Rule 23 gives district courts the power to revisit and revise its decision in light of new developments or evidence. Under Rule 23(c)(1)(C), "[a]n order that grants or denies class certification may be altered or amended before final judgment." Accordingly, "[a] district court may decertify a class if it appears that the requirements of Rule 23 are not in fact met." *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982). This authority is particularly important because, ordinarily, "the decision on class certification comes before full merits discovery has been completed" and the certification decision "may therefore require revisiting upon completion of full discovery." *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005).

All the tools needed to ensure a federal class action presents a live Article III case or controversy are already in the hands of the district courts. As Judge Posner states, Rule 23 establishes "the efficient procedure for litigation of a case" where the defendant "may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit." *Butler*, 727 F.3d at 798. AAJ urges this Court not to undermine the purposes of Rule 23 by setting an unprecedented, extraneous, and unwarranted barrier to access to federal courts for plaintiffs who have suffered violation of federally protected rights.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision of the lower courts.

Respectfully submitted,

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working people.[1] The AFL-CIO has a strong interest in employees being able to represent and join with one another to enforce their rights under the Fair Labor Standards Act (FLSA) and other federal and state labor standards laws.

SUMMARY OF THE ARGUMENT

I. Tyson waived any objection to this case proceeding as a collective action under § 216(b) by not adequately presenting the issue in its brief. The issue is an important one to all employees covered by the FLSA and one of first impression in this Court, yet Tyson makes no argument in support of its position. Rather, Tyson makes the bald and unsupportable assertion that the standards for determining whether employees are "similarly situated" under § 216(b) "can be no less stringent" than those applied under Rule 23(b)(3). But § 216(b) and Rule 23(b)(3) differ on their face; have different origins, distinct purposes, and vastly different scopes; and operate in "fundamentally different" manners. *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1529 (2013). Thus,

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[1] Counsel for the petitioner and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

the overwhelming majority of lower federal courts have rejected Tyson's position, specifically in relation to the predominance requirement.

II. The District Court did not abuse its discretion in certifying the Rule 23(b)(3) class despite variation in the hours worked by "gang time" employees. The Rule requires only that common questions "predominate." "[Q]uestions affecting only individual members" of the class can exist, including questions relating to damages.

Tyson's argument is not actually about certification of the class, but about the quality of the evidence introduced at trial concerning hours worked. But even assuming that evidence was somehow deficient, any error at trial does not infect the certification decision. Viewed from the perspective of the trial judge deciding the motion to certify a class, the common questions predominated because the individual questions did not require wholly individualized proof and could have been efficiently tried in a number of ways, including that employed by Plaintiffs, without overwhelming the common questions.

This Court's holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), permitting employees to prove how many hours they worked "as a matter of just and reasonable inference" when their employer has reached its duty to keep records applies both to proof that the employees worked more than 40 hours and to proof of how many more. But application of *Mt. Clemens* is not necessary to hold that Plaintiffs could and did prove hours worked using appropriate representative proof that did not overwhelm the fully common questions.

III. The District Court did not abuse its discretion by certifying the Rule 23(b)(3) class despite the fact that it was likely some members never worked more than 40 hours in a week because Plaintiffs' evidence identified such employees and the judge's instructions insured that their claims did not add to the jury award and that they did not share in that award. Under Tyson's reading of Rule 23(b)(3), the only individual questions that could exist would be about the amount of damages contrary to the unambiguous text of the Rule. Tyson's reading would preclude certification in almost every case.

IV. If this Court decides that Tyson has not waived its objection to the case proceeding as a collective action under § 216(b), it should hold that the District Court did not abuse its discretion in so permitting because the more stringent standards of Rule 23(b)(3) were met and because each of the criteria identified by the lower federal courts applying the similarly situated standard supports the conclusion that the employees were so situated here.

ARGUMENT

Introduction

Four preliminary points place this case in context.

1. The employees at issue all work in Tyson's Storm Lake Iowa pork processing plant. The work they perform is hard, demanding and dirty. *See* J.A. 51-52 (on Cut Line), 58-59 (on Slaughter Floor), 67 (on Retrim Line),[2] 118 (generally). For example,

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[2] The Processing Floor includes the cut and retrim lines. J.A. 146.

one "Splitter" testified that he uses a 200lb saw with an 18 inch blade to cut about 17 hogs in half per minute. J.A.303-05. The employees earn between $11 and $15.50 per hour (or between $23,000 and $32,000 per year). J.A. 122. The employees all alleged that they were not compensated as required by the federal FLSA and the Iowa Wage Payment and Collection Law for time spent performing required tasks at the start and end of their work day, such as donning and doffing protective garments, sanitizing knives and other equipment, and traveling to and from their work stations.

Tyson and many of its *amici* seek to characterize this case as being about "enterprising lawyers and their experts." Chamber Br. 19. But, as this Court held over a half century ago, here, "we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 (1944).

2. The Rule 23 class and the subset thereof that joined the action pursuant to 29 U.S.C. § 216(b) are relatively small (3,344 and 444 respectively), clearly defined, and "sufficiently cohesive." *Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1196 (2013).

All the employees work for a single employer at a single plant. J.A. 117. Even more specifically, all the employees work on two floors of the plant, the Slaughter or "Kill" floor and the Processing or "Fabrication" floor. They do similar work using similar tools and wearing similar protective clothing.

All the employees are paid according to the same system. The fact that that pay system—unique to members of the class—is denominated "*gang* time" by Tyson itself further evidences the cohesive nature of the group. Pet.App. 45a-46a (emphasis added). The method used to calculate employees' base compensation does not vary by individual. Rather, each employee starts getting paid when the first hog "hits the floor" and stops getting paid when the last hog "hits the floor." *Id.* Every employee spends additional time before and after the start and end of such "gang time" changing in and out of protective clothing, preparing and cleaning tools, and traveling to and from their work stations, but no "gang time" employee is compensated for the precise amount of time spent performing those required tasks. Pet.App. 47a-48a.

Tyson's own practices evidence the cohesiveness of the class in relation to the precise question at issue here. Not only did Tyson not compensate all members of the class based on the actual time each individual spent performing required tasks at the start and end of the day, Tyson itself considered the time the individuals spent engaged in such activities to be sufficiently similar that it paid them the same, lump-sum amount to compensate them for the time. J.A. 48, 65, 121, 432. In fact, Tyson calculated the extra pay using methods that closely parallel the proof in this case. J.A. 434, 437 ("the industrial engineer will do their [sic] study to determine how many minutes" for each position), 437 ("That's what the K-code is. It is the amount of time that we expect you to do that pre and post-shirt activity [in].")

3. The injuries in this case are precisely the type that class and collective actions were designed to enable individuals to remedy in court. The average damage award was $846.94 ($2,892,378.70/3,344). Without access to class and collective actions, these employees and others similarly situated who have been illegally deprived of small amounts of pay will be unable, as a practical matter, to enforce their statutory rights. As Judge Posner observed in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013), "Although each class member claims to have lost several thousand dollars as a result of [the employer]'s alleged [wage and hour] violations, that isn't enough to finance a modern federal lawsuit; it is class treatment or nothing."

Even more specifically, Congress intended § 216(b) of the FLSA to enable groups of workers to recover unpaid wages in amounts that are small in relation to the cost of litigation, but nevertheless crucial to the well-being of the workers. *See Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). When Congress amended § 216(b) in 1947, claims of the precise type at issue here, for compensation for start and end of the day activity and walking time – for "portal-to-portal" pay – were *the* central focus of the debate. And Congress decided to leave untouched employees' rights *both* to compensation for clothes changing that is "an integral part of and indispensable to their principal activities" and to walking time once such "principal" activities have begun *as well as* to sue on behalf of others "similarly situated," while it revised other parts of the FLSA, including § 216(b). *Steiner v. Mitchell*,

350 U.S. 247, 255 (1956); *IBP, Inc. v. Alvarez*, 546 U.S. 27, 37 (2005); *infra* at 12 n. 9.

4. Finally, the sole non-common question alleged by Tyson is entirely the product of Tyson's violation of the law. Tyson was required by law to keep accurate records of all hours worked by its employees each week. *See* 29 U.S.C. § 211(c); 29 C.F.R. § 516.21(7); Iowa Code § 91A.6(1)(d). Had it done so, the calculation of the damages owed each class member would have been wholly mechanical.

In fact, Tyson used seven time clocks in the plant. If employees were one minute late, a clock recorded the time and their pay could be docked. J.A. 174. Tyson's Human Resource Manager acknowledged that that "the company has a time-system in place where it is administratively practical to keep up with the employees' time down to the minute." J.A. 175. Tyson could easily have instructed employees to punch in at the start of their first work activity and punch out at the conclusion of their last activity. J.A. 208-09. Yet the parties stipulated, "Tyson does not use such recorded time to determine an employee's compensable hours or pay." J.A. 120.

Tyson chose both to violate the substantive law and to ignore the record keeping requirements and now uses the consequences of the latter transgression to suggest that its employees cannot resort to a class or collective action and therefore cannot, as a practical matter, obtain a remedy for Tyson's violation of the substantive law.

I. Tyson Waived Any Objection to the Collective Action Under § 216(b) of the FLSA by Not Adequately Presenting the Issue In Its Brief

Tyson's brief does not address the § 216(b) issue with sufficient detail for this Court to reverse the court of appeals.[3] In full, Tyson's argument concerning § 216(b) occupies two pages and, as we explain below, contains no colorable argument. Pet. Br. at 25-27.[4]

A. The standard courts should apply in deciding whether to permit an action to proceed as a collective action under § 216(b) is an issue of first impression in this Court. The only decisions of this Court considering § 216(b), *Hoffmann-La Roche* and *Genesis*, in no way address the meaning of the term "similarly situated." The sole and "narrow question" presented in *Hoffman-La Roche* was "whether a district court conducting a suit [under § 216(b)] may authorize and facilitate notice of the pending action." 493 U.S. at 167, 169. This Court did not mandate or even approve a certification-type procedure, but held only "that district courts have discretion in appropriate cases, to implement 29 U.S.C. § 216(b) by facilitating notice to potential plaintiffs" and that "the District Court was correct to permit discovery of the names and addresses of the" similarly-situated employees for that purpose. *Id.* at 169-70. Nothing in the opinion speaks to the standards that

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[3] Tyson's Petition did not point to any split in the Circuits concerning § 216(b).

[4] Tyson's amici also make no relevant argument concerning § 216(b).

should apply to determine if employees are "similarly situated" for purposes of permitting such discovery and notice.

Genesis considered only whether an action brought as a collective action under § 216(b) "is justiciable when the lone plaintiff's individual claim becomes moot." 133 S.Ct. at 1526. In *Genesis*, the case was dismissed as moot before the trial court authorized it to proceed as a collective action and thus this Court had no occasion to consider the standards that should apply in making that determination.

Despite the fact that this Court has not addressed the question, Tyson asserts that "the standards governing certification[5] of a collective action under the FLSA can be no less stringent" than those under Rule 23(b)(3). Given the complete absence of relevant jurisprudence in this Court speaking to the standards applicable under § 216(b) and Tyson's complete failure to present any substantive argument on the issue, it would be unwise for this Court to address this important and unsettled issue. As then Judge Scalia stated, "the issue is one of first impression, and of major importance to all employees We will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more than the assertion . . ., with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir. 1983). *See also, e.g., Borges v. Serrano-Isern*, 605 F.3d 1, 6 (1st Cir. 2010) ("failure to present any devel-

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[5] Nothing in § 216(b) requires "certification."

oped argumentation" resulted in waiver); *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.") This Court has observed that "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues . . and parties vigorously advocating opposing positions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980). Here, Tyson has made an unsupported assertion and therefore not presented the issue at all.

Moreover, Tyson's bald assertion is contradicted by the authorities it cites. After asserting that the standards under § 216(b) "can be *no less stringent*" than under Rule 23(b)(3), Tyson cites a single court of appeals decision and for the different proposition that assessing whether employees are "similarly situated" for purposes of § 216(b) "requires an analysis *similar to* that under Rule 23(b)(3)." Pet. Br. 26 (emphasis added). And in the cited decision, Judge Posner acknowledges that his position is contrary to that of the Sixth and Eleventh Circuits. *Espenscheid*, 705 F.3d at 772. Moreover, the one court of appeals decision cited for support in *Espenscheid* actually states:

> Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the 'similarly situated' standard. To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 (either the current version or the pre-1966 version) would effectively ignore Congress' directive.

Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001).[6] Indeed, just three months before *Espenscheid* issued, the Third Circuit noted that *no* court of appeals had adopted a standard for applying the "similarly situated" test derived from Rule 23. *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012).

The only other authority concerning § 216(b) Tyson cites is 7B Wright & Miller, Federal Practice and Procedure § 1807. Pet. Br. 27 n. 3. But Wright & Miller state, "Most courts have held that the Rule 23 certification requirements do not apply in collective actions" under § 216(b). *Id.* at 479. The treatise specifically notes that "courts also have held that the 'similarly situated' standard is less stringent than the requirement of Rule 23(b)(3), which specifies that common questions of law and fact predominate." *Id.* at 482.

B. Section 216(b) and Rule 23(b)(3) differ on their face, in the scope of their application, and in their operation. Nothing suggests that the same standards should apply under the distinct provisions. In *Genesis*, this Court observed, "there are significant differences between certification[7] under Federal Rule of Civil Procedure 23 and the joinder process under §216(b)." 133 S.Ct. at 1527 n. 1. "Whatever

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[6] The Court did, however, go on to state that "there is little difference in the various approaches." *Id.* That is not correct as we demonstrate in § I(D) *infra*.

[7] This Court did "not express an opinion on the propriety of this use of class-action nomenclature" by some lower courts. 133 S.Ct. at 1527 n. 1.

significance 'conditional certification' may have in §216(b) proceedings, it is not tantamount to class certification under Rule 23." *Id.* at 1532. Indeed, this Court observed, "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Id.* at 1529.

Section 216(b) is a statutory provision[8] that originally applied only to actions brought to enforce the FLSA. FLSA of 1938, Pub. L. No. 75-718, 52 Stat. 1060. Subsequently, the Equal Pay Act was inserted into the FLSA and the Age Discrimination in Employment Act incorporated § 216(b). *See* 29 U.S.C. § 206(d) and 626(b). Thus, the procedures created by § 216(b) are now available only in actions to enforce three federal employment laws while Rule 23 potentially applies to any action brought in federal court.

The policies embodied in the FLSA as well as the two subsequently enacted employment laws incorporating § 216(b) appropriately infuse § 216(b)'s construction in contrast to the relationship between substantive laws and Rule 23. This Court has held that the provisions of the FLSA "are remedial and humanitarian in purpose" and thus the statute "must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal*, 321 U.S. at 597. This Court has recognized that in § 216(b) "Congress has stated its policy that [FLSA, EPA, and] ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche*, 493 U.S. at 170. And this Court stated with specific ref-

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[8] The Rules Enabling Act thus has no application to the construction of § 216(b).

erence to § 216(b), "The broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* at 173.

Not only does § 216(b) have a unique origin, distinct purpose, and narrower scope than Rule 23, the procedures and standards created by Rule 23 are entirely distinct from those embodied in § 216(b). Section 216(b) provides:

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[9]

Section 216(b) does not contain any of the procedural requirements contained in Rule 23(c)-(h)[10] or the sub-

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[9] The section was amended in 1947, but Congress did not in any way alter the "similarly situated" standard. The Senate Report on the amendments made clear, "Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the act." S. Rep. No. 48, 80th Cong., 1st Sess. 49 (March 10, 1947). The Conference Report provided the same. H.R. Rep. No. 326, 80th Cong., 1st Sess. 13 (April 29, 1947). Senator Donnell, chairman of the drafting subcommittee, confirmed this intent on the floor. 93 Cong. Rec. 2,182 (1947).

[10] Similarly, while Rule 23(f) authorizes courts of appeal to permit an appeal from an order granting or denying class certification, the lower federal courts have held that an order granting or denying a request to proceed as a collective action

stantive requirements contained in Rule 23(a) and (b). Likewise, the substantive standard contained in § 216(b)—that the employees be "similarly situated" – is not contained in any of the sections of Rule 23(a) or (b). And the procedural requirement contained in § 216(b)—written consent to become a party plaintiff—is not contained in any of the provisions of Rule 23.

There can also be no suggestion that the standards and procedures in Rule 23 should be read into the earlier-adopted § 216(b). The drafters of the 1966 amendments to Rule 23 that created (b)(3) classes and placed the Rule in its current form specifically stated that "the present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23, advisory committee's note, reprinted in 39 F.R.D. 69, 104 (1966).[11] If the Rule itself was not intended to alter construction of § 216(b) surely subsequent Supreme Court construction of the Rule, such as that in the cases relied on by Tyson, was not either.

C. Congress adopted different standards under Rule 23 and § 216(b) because an action maintained under Rule 23(b)(3) and an action maintained under § 216(b) are distinct in highly significant respects.

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under § 216(b) is not immediately appealable. *See, e.g., McElmurry v. U.S. Bank National Ass'n*, 495 F.3d 1136, 1139-40 (9th Cir. 2007).

[11] In the Court of Appeals, Tyson erroneously argued that Rule 23 actually "governs" FLSA actions, Br. For Appellant at 38 n. 7, failing to cite controlling precedent granting a writ of mandamus directing a district court to vacate an order certifying a Rule 23 class in an FLSA action. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975).

First, an action that proceeds as a class action under Rule 23(b)(3) includes all persons within the description of the class who do not opt out while an action that proceeds under § 216(b) includes only those persons who consent in writing to be a party plaintiff. As this Court observed in *Genesis*:

> a putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees . who in turn become parties to a collective action only by filing written consent with the court.

133 S.Ct. at 1530. Thus, courts need not be concerned about binding absent class members who have not consented to join an action under § 216(b).

Second, the filing of an action as a class action under Rule 23 stays the running of the statute of limitations for all persons within the description of the class while the filing of an action as a collective action under § 216(b) does not do so. *Compare Crown, Cork & Seal, Inc. v. Parker*, 462 U.S. 345, 353-54 (1983), *with* 29 U.S.C. § 256 (FLSA action is not commenced for tolling purposes for any person, even those specifically named in the original complaint, until written consent is filed).

Third, in an action maintained under Rule 23, absent class members are not considered full parties while under § 216(b) each person who files written

consent becomes a "party plaintiff." The Eleventh Circuit observed, "by referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.'" *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259 n. 35 (11th Cir. 2008). Thus, one district court observed that under § 216(b) "Plaintiffs are not absent members of a Rule 23 class action, but opt-in plaintiffs under § 216(b) of the FLSA. Having opted into the litigation, [plaintiffs] are not 'passive' in the same sense as absent Rule 23 class members." *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, 2007 U.S. Dist. LEXIS 36893 at *22 (N.D. Ga., 2007). In some jurisdictions, plaintiffs' counsel is required to amend the complaint to add all the individuals who file consent forms as plaintiffs and state claims on their behalf. "Section 216(b) operates in conjunction with Rule 8 of the Federal Rules of Civil Procedure and requires the employee to name the individual plaintiff and allege his or her cause of action in the complaint." *Harkins v. Riverboat Servs.*, No. 99 C 123, 2002 U.S.Dist. LEXIS 19637 at *16-17 (N.D. Ill., May 16, 2002). *See also Becker v. Southern Soils*, No. 6:06-cv-Orl-28JGG, 2006 U.S. Dist. LEXIS 85111 at *2 n.1 (M.D. Fla., Nov. 20, 2006). And in some jurisdictions, each person who files a consent is subject to party discovery (*i.e.*, is obligated to respond to interrogatories and requests for admissions and production). *See, e.g., Ingersoll v. Royal & Sunalliance USA, Inc.*, No. C05-1774-MAT, 2006 U.S. Dist. LEXIS 50912 at 7-8 (W.D. Wash., July 25, 2006) ("the Court is persuaded by the reasoning of courts

permitting individualized discovery of opt-in plaintiffs"); *Coldiron v. Pizza Hut, Inc.*, No. CV03-05865TJHMCX, 2004 U.S. Dist. LEXIS 23610 at *4-5 (C.D. Cal., Oct. 25, 2004).

Finally, in a § 216(b) action, "decertification" should result in severance of all party plaintiffs' claims, while after decertification of a Rule 23 class absent class members must file new actions in order to pursue their claims. *Cf. Lee v. Cook County*, 635 F.3d 969, 971 (7th Cir. 2011) (mis-joinder under Rule 20 results in severance).

D. For the foregoing reasons, the overwhelming majority view is that Rule 23 standards should not be used in applying § 216(b)'s "similarly situated" standard. *See, e.g., Zavala*, 691 F.3d at 536; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n. 12 (11th Cir. 1996) ("it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23"); *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 519 n. 1 (5th Cir. 2010) ("we have clearly held that not all Rule 23 class action standards are applicable to § 216(b) actions"); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) ("Under the FLSA, opt-in plaintiffs only need to be 'similarly situated.' While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA.")[12]

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[12] Lower federal courts are unanimous in holding that the decision to permit an action to proceed as a collective action is reviewed using an abuse of discretion standard. *See, e.g., Morgan*, 551 F.3d at 1261-62.

The lower federal courts have specifically held that Rule 23(b)(3)'s predominance requirement is not applicable to § 216(b) actions.[13] The Second Circuit held that the question of whether employees are "similarly situated" "is quite distinct from the question whether plaintiffs have satisfied the much higher threshold of demonstrating that common questions of law and fact will 'predominate' for Rule 23 purposes." *Myers v. Hertz Corp.*, 624 F.3d 537, 556 (2d Cir. 2010). The Court continued, "we are easily able to determine here that the higher predominance standard has not been met without addressing whether the same evidence plaintiffs have put forward in support of Rule 23 class certification could satisfy the lower standard" of "similarly situated." *Id.* The Sixth Circuit held that "unless one excludes Rule 23 predominance from being an implicit requirement for § 216(b) collective actions," the standard "is more demanding than what the statute requires." *O'Brien*, 575 F.3d at 585. "[A]pplying the criterion of predominance undermines the remedial purpose of the [§ 216(b)] collective action device." *Id.* at 585-86. The Eleventh Circuit stated that § 216(b)'s similarly situated requirement "is considerably less stringent than the requirement of [Rule 23(b)(3)] that common questions 'predominate.'" *Grayson*, 79 F.3d at 1096.

E. In the lower courts here, both parties well understood that different standards apply under Rule 23 and § 216(b). In fact, in contrast to its unsupported assertion in this Court, in the District Court, Ty-

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[13] Rule 23(b)(3) (and thus the predominance requirement) did not exist in either 1935 or 1947 when § 216(b) was adopted and amended.

son argued, "These class procedures in the FLSA and Rule 23 are intentionally in contrast to each other." Defendant's Resistance to Plaintiffs' Motion for Class Certification at 6, Dkt. 45. Tyson there asserted that there was a "fundamental inconsistency between the opt-in provisions of the FLSA and the provisions of Rule 23." *Id.*

In the District Court, Plaintiffs made two separate motions—one for class certification under Rule 23 and another to proceed as a collective action under § 216(b). Plaintiffs' Memorandum in Support of Motion for Rule 23 Class Certification, Dkt. 35; Plaintiffs' Memorandum in Support of Motion for Conditional Certification as a Collective Action, Dkt. 34. Tyson filed two separate oppositions. Defendant's Resistance to Plaintiffs' Motion for Class Certification, Dkt. 45; Defendants Brief in Opposition to Plaintiffs' Motion for Conditional Certification as a Collective Action, Dkt. 49. The moving papers and the oppositions cited wholly distinct lines of cases. As a result, the District Court properly analyzed each issue separately. Pet.App. 69a-93a, 93a-110a. In the Court of Appeals, Tyson acknowledged that the Eighth Circuit had "not decided the proper test for determining whether a plaintiff has carried his burden to certify an FLSA class" and stated that "the court need not decide the proper standard." Br. for Appellant at 37, 38 n. 7. Not until the case reached this Court did Tyson make the bald and unsupportable assertion that the standards are identical under Rule 23(b)(3) and § 216(b).

This Court should hold that Tyson waived the § 216(b) issue.

II. The District Court Properly Certified the Class Under Rule 23(b)(3) Despite Variations in Hours Worked Among the "Gang Time" Employees

A. Tyson concedes that all of the requirements for certification of the class under Rule 23(b)(3) were satisfied in this case except one: predominance. But in arguing that the trial court erred in finding predominance, Tyson effectively changes the requirement from one requiring that common questions predominate to one requiring that *all* questions be common.

At the certification stage, the District Court correctly described the non-common questions that existed and correctly weighed them against the common questions as part of the predominance inquiry. The Court found in its initial certification order, "Individual questions may exist, but the court does not believe they predominate." Pet.App. 109a. The Court did not reach that correct conclusion by assuming that the individual questions could be answered "with statistical techniques that presume all class members are identical to the average observed in a sample" as Tyson suggests. Rather, the Court reasoned that while the damage questions were not wholly common to all members of the class, neither were they wholly unique to each individual. The Court found that all the employees "wear some sort of PPE [Personal Protective Equipment], and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE." Pet.App. 99a. The Court reasoned:

> [A]mong gang time paid employees, the evidence only shows factual differences regarding the spe-

> cific PPE these employees wear and the tools they carry. The court does not feel these differences necessitate individualized inquiry to prove a violation because most all gang time employees wear at least the same basic PPE and use some kind of knife or tool. Moreover, there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited.

Pet.App. 100a-101a. In other words, the District Court concluded that proof of time worked could not be via wholly common evidence, but neither would it require separate evidence for each employee. On that basis, the Court correctly found predominance.

Predominance does not require that there be no individual questions. "Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.' What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen*, 133 S.Ct. at 1196 (quoting Rule 23(b)(3)). The question is not whether any non-common issues exist, the question is whether there is "'some *fatal* dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Id.* at 1197 (emphasis added). That was clearly not the case here.

Relying on a single sentence in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), Tyson argues that, even if common questions predominate, the need for individualized damage calculations precludes certifi-

cation. But nothing in the text of Rule 23(b)(3) suggests that result and the single sentence in *Comcast* cannot be read as such a holding. Rather, the single sentence – "Questions of individual damage calculations will inevitably overwhelm questions common to the class" – applies only to the facts of that case. *Id.* at 1433. As Justice Ginsburg pointed out, as a general proposition,

> Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal. *See* 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, 'individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)'). Legions of appellate decisions across a range of substantive claims are illustrative.

Id. at 1437 (Ginsburg, J., dissenting).

A simple example demonstrates that Tyson overreads *Comcast*. Imagine every employee spends a different amount of time donning and doffing protective garments. But imagine Tyson had kept accurate time records of all hours worked. There would still be "[q]uestions of individual damage calculations," but it is clear that they would not "inevitably overwhelm questions common to the class" because the questions would be easily answered. Thus, *Comcast* cannot possibly stand for the categorical proposition advanced by Tyson.

Because it overreads the sentence in *Comcast*, Tyson focuses exclusively on the one factual question it claims is not common to all members of the class—

the number of hours worked each week.[14] But the predominance standard cannot be answered without also considering the common questions and then comparing the two. By doing so, the District Court correctly found predominance.

B. Tyson's argument is actually not about class certification at all. Tyson's argument is about the quality of evidence introduced at trial. This is clear from the very terms in which Tyson framed the question presented—whether a trial court may certify a class "where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample." Pet. Br. i. Liability and damages are not "determined" until trial. In this case, as Plaintiffs demonstrate, the jury found liability and assessed damages based on representative evidence, together with other forms of proof, that permitted a reasonable inference concerning the damages suffered by each class member. There was no "presumption." But even *if* the District Court had permitted liability and damages to be proven at trial with evidence admitted based on such a presumption, it might have constituted an error in the admission of the evidence or the failure to grant a motion for a directed verdict or a new trial,[15] but it would *not* have undermined the ruling granting class certification.

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[14] Tyson argues that there are other individual questions, such as whether some employees were paid for start and end of the day activities, but not only are such employees not "gang time" employees and thus not class members, Tyson's payroll records make answering those questions simple.

[15] This was Tyson's first and primary argument in the Court

At trial, Tyson proposed and the judge gave an appropriate instruction on representative proof. Final Instruction 10 read:

> [I]f some employees testify about the activities they performed or the amount of unpaid time they worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This kind of evidence called [sic] 'representative evidence.' . [T]he weight to be accorded the evidence is a function not of its quantity, but of its quality – *whether the testimony covers similarly situated workers*, and is generally consistent. *You may also consider whether the witnesses who testified* worked in or with similar positions and similar departments as the non-testifying employees; whether they *wore similar sanitary and protective items; whether the testifying employees performed donning and doffing activities similarly to non-testifying employees.*

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of Appeals. Tyson's arguments that "Judgment as a matter of law should have been granted to Tyson because Plaintiffs failed to prove overtime liability on a class-wide basis" and that "because Plaintiffs' trial-by-formula approach was improper" and parallel argument that the District Court erred by not granting a new trial consumed 20 of the 27 pages of argument in its Brief and all but three pages in its Reply Brief. Br. for Appellant at 19-38; Reply Br. for Appellant at 4-30. Here, Tyson has improperly recast its argument about the inadequacy of the evidence at trial as an attack on class certification in order to avoid the "two court rule." *See, e. g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below.")

J.A. 472 (emphasis added), 93 (Tyson's proposal). *If* the Plaintiffs' evidence did not meet that standard as a matter of law, Tyson could have so argued to the jury,[16] moved for a directed verdict and, if the motion was denied, appealed. In fact, Tyson did all of those things. But a failure of proof at trial does not infect the certification decision.

Tyson's argument is about the quality of the trial evidence: "the lower courts then compounded their error by allowing plaintiffs to 'prove' injury and damages on a classwide basis with statistical sampling that masked these individual differences." Pet. Br. 19. Plaintiffs demonstrate that there was no such error, but, *even assuming* there was, the error was at trial and is not relevant to certification or decertification of the class.

Tyson and its *amici* are wrong when they argue that alleged flaws in the trial evidence undermine the original certification decision or should have constituted grounds for decertification. *See, e.g.*, Dow Br. 9 ("Once a class is certified, the practical realities of trial mean that such individualized differences among class members will never be examined.") The trial court acknowledged the existence of questions not common to all members of the class in its certification decision and, as Plaintiffs demonstrate, those questions were examined at trial and Tyson had every opportunity to explore them more fully. This Court need not alter the standards for certification in order to insure competent evidence is introduced at trial.

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[16] As this Court recognized in *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977), "statistics are not irrefutable; . . . they may be rebutted."

C. Appellate courts must review the certification decision from the perspective of the trial judge. A trial judge cannot know what evidence plaintiffs will offer to prove each element of their claim. In fact, plaintiffs' counsel cannot be expected to know, at the certification stage, what evidence they will proffer at trial. A trial judge can and should assess the common questions of law and fact and weigh them against the "questions affecting only individual members" of the putative class and in doing so a trial judge can and should consider the *various ways* in which the latter could be presented.

Thus, it is critical to recognize that while Tyson argues correctly that "Plaintiffs . . must show that they worked more than 40 hours without receiving overtime compensation," Tyson is incorrect when it states that "[t]he latter showing cannot be made with common evidence because individual class members wear different combinations of personal protective equipment that take varying amounts of time to don, doff, and rinse." Pet. Br. 19. That is incorrect or, at best, a gross overstatement, because there is no dispute about the fact that much of the protective clothing worn by employees was common as were many of the other start and end of day activities and the requirement of walking. For that reason, the District Court correctly concluded that Plaintiffs could present proof concerning the not fully common questions at trial without overwhelming the common questions, *i.e.*, that the latter predominated.

Plaintiffs' opening brief demonstrates that the proof actually introduced at trial both confirmed the District Court's earlier finding that the common questions pre-

dominated and provided a sufficient basis for the jury's verdict. Rather than reiterate that argument, we demonstrate here that there were, in fact, numerous ways in which Plaintiffs could have proven damages without the individual questions overwhelming the common questions and thus that the District Court's finding of predominance was correct.

The parties stipulated that all "gang time" employees are required to wear some common items of protective clothing for safety and sanitation purposes. J.A. 119, ¶ 19, 249-50. Further, all processing employees wear a frock and all Slaughter employees a light-color shirt and pants and an apron. J.A. 119, 150, 233. Tyson acknowledges in its brief that the specific items of protective clothing required in each unique position in the plant are listed at J.A. 125-38. Pet. Br. 10. *See also* J.A. 162-64, 241-42. All the unique positions in the plant (e.g., "Gut hogs") are listed on the y axis and each of the unique pieces of protective clothing employees in each position are required to wear are listed on the x axis (e.g., "shin guards"). The chart reveals that there are only 14 unique pieces of protective clothing, J.A. 125-38, 163, *see also* J.A. 74-85, 118-19, of which only 11 were actually worn by employees at the plant. J.A. 163. Using representative proof to demonstrate how long it takes to put on and take off each item, it would have been mechanical to calculate damages for each individual based simply on their position, their wage rate, and Tyson's time and attendance records,[17] even assuming that

[17] In the Court of Appeals, dissenting Judge Beam found that Tyson maintained "adequate attendance, assignment, equipment, work time and payroll records." Pet. App. 121a.

there are more than 420 positions as Tyson suggests. Pet. Br. 4.[18]

Proof of damages did not require that each employee who wore a particular type of protective garment testify about how long it took him or her to don and doff the garment. Testimony from a representative sample of employees required to wear each protective garment would have sufficed.[19] For example, if three representative employees testified about each of the 11 unique garments, there would only have been 33 witnesses and, given the simple nature of the testimony (e.g., "how long did it take you to put on and take off the shin guards"), this testimony would not have been burdensome for the court to receive. Alternatively, an industrial engineer could have studied how long it took a sample of employees to put on and take off each unique garment.[20]

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[18] 420 appears to be the total number of positions and not the total number of "gang time" positions.

[19] Tyson argues that "[n]o court would allow an individual employee to meet his 'burden of proving that he performed work for which *he* was not properly compensated,' . . . by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform." Pet. Br. 36. But surely any court would permit representative testimony concerning how long it took each employee to perform the same task rather than requiring thousands of employees to each testify about how long it took them to perform the task.

[20] This is what Tyson's own industrial engineers did to derive the K-code time for each position. *See* J.A. 446-53. The "group manager of industrial engineers for the Pork Division" described this as "a very simple time study." J.A. 452.

Plaintiffs could easily have proved the hours worked by each employee at trial in any number of manners (in addition to the manner actually used) that would not have overwhelmed the fully common questions. Thus, looked at from the certification stage, the District Court was correct when it concluded, "Tyson's possible defenses are not as individualized as Tyson wants the court to believe" and thus that the common questions predominated. Pet.App. 89a.

D. This Court's decision in *Mt. Clemens*, fully supports the foregoing argument, but the forms of representative proof that were and could have been offered in this case were proper *regardless* of whether *Mt. Clemens* applies.

The *Mt. Clemens* Court recognized "that it is the employer who has the duty under § 11 (c) of the Act to keep proper records of wages, hours and other conditions and practices of employment." 328 U.S. at 687. *Mt. Clemens* further recognized that, in the absence of such records, it may be difficult for employees to prove both liability (because liability always depends to some degree on the number of hours worked) and damages. This Court reasoned that the employee "has the burden of proving that he performed work for which he was not properly compensated," *i.e.*, to prove liability, and held that "[t]he remedial nature of this statute and the great public policy which it embodies . . . militate against making *that burden* an impossible hurdle for the employee." *Id.* (emphasis added).

Tyson argues that *Mt. Clemens*' holding does not apply until *after* the employee has proven liability.[21]

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[21] Even accepted, this argument has extremely limited ap-

Similar to its reading of *Comcast*, Tyson does this by taking a single sentence, indeed, in this case, a single part of a sentence, out of context. Tyson points to the following language: "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated." Tyson argues that it is only *after* carrying that burden that the employee can prove the amount of damages he suffered with "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." But such a reading of *Mt. Clemens* would defeat its central holding. When an employer has failed to keep records, it is no less difficult for employees to prove they worked over 40 hours in a work week than it is to prove how many hours over 40 they worked. It would make no sense and wholly undermine the rationale of *Mt. Clemens* to demand exacting proof of the first 40.1 hours worked but not of any additional hours.

Tyson's reading of *Mt. Clemens* is also inconsistent with its actual holding. The evidence the court of appeals found insufficient in that case was not simply evidence of the amount of damage suffered, but evidence that the FLSA was violated. The court of appeals reinstated a master's finding that "the plaintiffs had not established by a fair preponderance of evidence a violation of the [FLSA]." 149 F.2d 461, 464 (6th Cir. 1945). That was the holding reversed by this Court.

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plicability here because it is undisputed that the vast majority of "gang time" employees worked six days a week for at least 48 hours. J.A. 122, 181-82, 326, 437.

Finally, even accepting Tyson's reading of *Mt. Clemens*, nothing in the single phrase Tyson cites suggests that the employee cannot carry "his burden if he proves that he has in fact performed work for which he was improperly compensated" with competent evidence of how long it took other similarly situated employees to perform the same tasks the employee performed. In other words, competent representative proof can be used to prove that an individual employee worked more than 40 hours per week and to prove how many hours over 40 he or she worked per week regardless of the ambit of *Mt. Clemens*' holding.

III. The District Court Properly Certified the Class Even Though It Was Possible That Not Every Employee Would Recover Damages

The second question presented is "Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages." Pet. Br. i. But in its brief, Tyson argues that a court may certify a class only if plaintiffs "show (1) that they can prove with common evidence that *all* class members were injured, *or* (2) that there is a mechanism for identifying the uninjured class members and ensuring that they do not contribute to the size of the damages award and cannot recover damages." Pet. Br. 21 (emphasis added).

Plaintiffs demonstrate that the evidence introduced at trial did "identify[] the uninjured class members and ensur[e] that they d[id] not contribute to the size of the damages award and cannot

recover damages." The jury was specifically instructed that "[a]ny employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." J.A. 481.[22] We demonstrated in § II(C) *supra* that there were, in fact, multiple "mechanism[s]" that could have been employed at trial "for identifying the uninjured class members [in this case] and ensuring that they do not contribute to the size of the damages award and cannot recover damages." Thus, Tyson's restated standard was clearly met here.

Tyson restates the question to avoid the untenable suggestion that a class cannot be certified if some members may ultimately not recover. To hold that a class cannot be certified if it contains members who might ultimately not sustain a claim that they have a right to damages would read the predominance standard out of Rule 23. To so hold would be to conclude that proof of injury must always be common. That would be inconsistent with the plain text of Rule 23 which makes plain that there may be some "questions affecting only some [class] members" and does not limit the subject matter of those questions. Rule 23(b)(3).

A no answer to Tyson's original question would be starkly inconsistent with the predominance standard because it would mean that if there is *any* non-common issue that might preclude some class members

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[22] Because Tyson filed its notice of appeal before there was any allocation of the jury award to individual class members, it surely cannot argue uninjured class members received damages.

from prevailing, certification cannot be granted. In other words, it suggests that the only question that cannot be common is the *amount* of damages owed each class member. Nothing in Rule 23 supports such a contention.

In fact, accepting Tyson's argument would preclude certification in almost all cases because unique deficiencies of proof and unique defenses are possible, even likely, in almost all cases. This Court concluded in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2412 (2014), that the fact that "defendant might attempt to pick off the occasional class member here or there through individualized rebuttal" does "not render class certification inappropriate." *See also Kohen v. Pacific Investment Management Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("Such a possibility or indeed inevitability does not preclude class certification."); *In re Nexium Antitrust Litigation*, 777 F.3d 9, 22 (1st Cir. 2015) ("excluding all uninjured class members at the certification stage is almost impossible in many cases").

IV. The District Court Properly Permitted the Action to Proceed as a Collective Action Under § 216(b)

If this Court decides that Tyson has not waived the argument that the District Court abused its discretion by permitting the action to proceed as a collective action under § 216(b), it should nevertheless reject the argument based on its conclusion that Plaintiffs satisfied the more demanding standards of Rule 23(b)(3) as explained in §§ II and III *supra*. And even if this Court finds it necessary to further

construe the "similarly situated" standard despite the complete absence of any colorable argument by Tyson as to its meaning, this Court should conclude that the District Court did not abuse its discretion in holding that the "gang time" employees were similarly situated.

Each of the criteria identified by courts of appeals applying the similarly situated standard support the District Court's conclusion. First, the "gang time" employees are "employed in the same corporate department, division, and location." *Zavala*, 691 F.3d at 537. Second, the employees have similar but not identical "job requirements" and "pay provisions." *Morgan*, 551 F.3d at 1259-60. Third, the employees "advance similar claims." *Zavala*, 691 F.3d at 537. Fourth, the employees were "subjected to some common employer practice[s] that, if proved, would help demonstrate a violation of the FLSA." *Id.* at 538. Fifth, the employees' "claims were unified by common theories of defendants' statutory violations." *O'Brien*, 575 F.3d at 585. Sixth, the employees "seek substantially the same form of relief." *Zavala*, 691 F.3d at 537. Seventh, the "defenses were not so individually tailored to each Plaintiff as to make [the] collective action unwarranted or unmanageable." *Morgan*, 551 F.3d at 1263. Finally, the employees are similarly situated even though "proof of a violation as to one particular plaintiff does not prove that the defendant violated any other plaintiff's rights under the FLSA." *O'Brien*, 575 F.3d at 585.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN INDEPENDENT BUSINESS ALLIANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Independent Business Alliance ("AMIBA") is a national nonprofit organization that represents the interests of independent, locally owned businesses and encourages entrepreneurship. AMIBA supports more than 80 affiliated community organizations across 34 states. Its affiliated organizations represent approximately 26,500 independent businesses covering nearly every sector of business.

AMIBA seeks to strengthen and enforce federal and state laws that prohibit restraints of trade and other unfair practices disadvantaging small businesses. AMIBA believes that such laws are essential to ensure that all businesses have the opportunity to compete and receive fair treatment under the law. In AMIBA's view, class actions provide a crucial vehicle for small businesses to band together to challenge anticompetitive and other unlawful conduct by larger businesses. AMIBA submits this *amicus* brief out of concern that acceptance of the sweeping arguments against class certification advanced by Petitioner and its supporting *amici curiae* in this case would make it far more difficult for small businesses to challenge such conduct via class actions in other cases, which would ultimately harm small businesses and prove devastating to the economy.

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[1] Pursuant to SUP. CT. R. 37.2(a), all parties have filed blanket consent letters with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Tyson Foods, Inc. ("Tyson") and various *amici curiae* in support of Tyson ask this Court to interpret Federal Rule of Civil Procedure 23 in an unprecedented and unduly restrictive manner that would eviscerate the class action device. They argue that an affirmance here would harm businesses, including small businesses. This purported concern is ill-founded. Class actions benefit small business and promote economic growth by facilitating private enforcement of important substantive laws, such as the antitrust laws.

In their briefing, Tyson and its *amici* attack statistical averaging and aggregate proof, claiming that such proof in this and other cases is subject to error and violates defendants' due process rights. The use of such proof, however, is well established under the law in a variety of contexts, and it has been routinely utilized by both plaintiffs and defendants. Restricting or eliminating such proof would decimate class actions.

Tyson and its *amici* also contend that Article III standing requires proof that all putative class members suffer injury. But, as recognized by a number of Circuit Courts of Appeals, including most recently the Third Circuit, this is not the law. For these reasons and those set forth below, this Court should reject Tyson and its *amici*'s broad assaults on class actions and affirm the Court of Appeals' decision.

ARGUMENT

I. Class Actions Benefit Small Businesses And Promote Economic Growth.

Certain *amici curiae*, in a charge led by the Chamber of Commerce of the United States of America (the "Chamber"), complain that the Eighth Circuit's decision, by purportedly "easing Rule 23's certification requirements," harms businesses, including small businesses.[2] But class actions are not inherently inimical to the interests of American business, as the Chamber argues. Quite to the contrary, in many important cases, class actions substantially benefit small businesses. The quintessential example of this is in the antitrust context, where private enforcement of the laws, particularly through class actions, is critical to safeguarding competition and promoting innovation and economic growth.

The recent case of *Dow Chemical Co. v. Industrial Polymers, Inc.*, No. 14-1091 (petition for certiorari filed Mar. 9, 2015) serves as a prime example. There, after a four-week trial, a jury rendered a verdict in favor of a plaintiff class after finding that the defendant, Dow Chemical Company ("Dow") – which has also submitted an *amicus* brief in support of Tyson in this case – conspired to fix prices of billions of

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[2] *See* Brief of the Chamber of Commerce of the United States of America, Business Roundtable, Retail Litigation Center, Inc., and the National Federation of Independent Small Business Legal Center as *Amici Curiae* in Support of Petitioner, Aug. 14, 2015 ("Chamber Br."), at 19-23; Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioner, Aug. 14, 2015, at 12-15.

dollars' worth of "urethane" chemicals. The jury also found that Dow's price-fixing allowed Dow and its co-conspirators to reap hundreds of millions of dollars in overcharges from its customers, which included numerous large and small businesses. Following the jury verdict, the District Court of Kansas entered a judgment against Dow, and the Tenth Circuit unanimously affirmed. Rehearing was denied. Significantly, Dow's Petition for Certiorari and its *amicus* brief in this case do not challenge the sufficiency of the evidence supporting the jury's verdict.

In *Dow*, thousands of businesses—the vast majority of which lacked the economic resources to pursue separate individual actions—combined their claims in a single, efficient class action to litigate common questions with common evidence in order to reach a common result. It is only as a result of Rule 23 that Dow has been held accountable for inflicting serious harm on the class in that case and the economy as a whole. *See also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) (a price-fixing class action brought on behalf of businesses who purchased high fructose corn syrup from Archer Daniels Midland and its co-conspirators); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (a class action brought on behalf of approximately 12 million merchants after Visa and MasterCard and issuing banks fixed the interchange fee for credit card transactions); *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2009 U.S. Dist. LEXIS 88404 (E.D.N.Y. Sept. 25, 2009) (a pending class action involving a worldwide price-fixing conspiracy in air cargo shipping services); *In re Vitamins Anti-*

trust Litig., No. 99-MC-197, 2000 U.S. Dist. LEXIS 8931 (D.D.C. 2000) (price-fixing class action brought on behalf of businesses who purchased bulk vitamins during a worldwide conspiracy); *In re Corrugated Container Antitrust Litig.*, 1983-2 Trade Cas. (CCH) ¶ 65,628 (S.D. Tex. 1983) (a seminal price-fixing class action that resulted in a jury verdict for the class after a several-month trial).

As *Dow* and other antitrust cases illustrate, class actions are critical to ensuring private enforcement of vital substantive laws. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-45 & n. 6 (1979) (holding that the antitrust laws were written to encourage private antitrust enforcement, including through class litigation). This is due at least in part to the limited resources of the government. *Id.* at 344. Indeed, the government does not pursue certain cases precisely because private civil enforcement is available via a class action. *See, e.g., In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1011-12 (E.D. Mich. 2010). Such private class actions are economically beneficial because they deter wrongdoing and compensate the victims of illegal activity. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). *See also Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("A class action, like litigation in general has a deterrent as well as a compensatory objective.").

Antitrust is not the only area of law where businesses have successfully enforced their rights through class actions. *See, e.g., Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-5693 PSG (RZX), 2015 U.S. Dist. LEXIS 98656, at *17 (C.D. Cal. May 27, 2015) (certifying class of sound recording copyright

owners in unfair business practices case); *In re Navistar Diesel Engine Prods. Liab. Litig.*, No. 11-2496, 2013 U.S. Dist. LEXIS 189619, at *9 (N.D. Ill. July 3, 2013) (approving class-wide settlement of claims brought by individuals and small businesses alleging product defect); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 900, 966 (E.D. La. 2012) *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (granting final approval of the economic and property damages settlement agreement; defining class to include business entities within a certain geographic boundary).

Dow, the Chamber, and other *amici curiae* nonetheless urge this Court to adopt sweeping generalizations about class certification and statistical quantification of damages that will make class certification more difficult in this and other cases, arguing that "[f]ailure to reverse here would even further ratchet up the pressure on class action defendants to settle even the weakest claims."[3]

To be clear, as an organization of small businesses that are sometimes defendants in lawsuits, AMIBA is certainly no fan of meritless litigation. But Tyson and *amici* are wrong about the purported issue of undue settlement pressure under Rule 23. Current federal practice strikes a careful and appropriate balance between facilitating meritorious class actions and discouraging dubious ones.

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[3] Brief for the Dow Chemical Company as *Amicus Curiae* in Support of Petitioner, Aug. 2015 ("Dow Br."), at 17; Chamber Br. at 19-22.

To the extent there are legitimate concerns regarding the possibility of baseless putative class actions, the Federal Rules of Civil Procedure already address such concerns.[4] *See, e.g., Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) (upholding grant of motion to dismiss implausible antitrust class action conspiracy claims); *In re Chocolate Confectionary Antitrust Litig.*, ___ F.3d.___, 2015 U.S. App. LEXIS 16405 (3d Cir. Sept. 15, 2015) (affirming grant of summary judgment in price-fixing class action lacking sufficient evidence of conspiracy).

Rule 23(f) now allows interlocutory appeals as an additional check on erroneous class certification decisions.[5] Moreover, Congress has taken legislative action in the past to curb class action abuse, such as through the Private Securities Litigation Reform Act and Class Action Fairness Act, and is quite capable of doing so again if it believes reforms are necessary.

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[4] *See, e.g., Fairness in Class Action Litigation Act of 2015: Hearing on H.R. 127 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 74 (2015) (statement of Prof. Alexandra Lahav) ("A 2008 study by the Federal Judicial Center, currently the most reliable source for empirical information on class actions, found that only 25% of diversity actions filed as class actions resulted in class certification motions, 9% settled and none went to trial. This means that class actions are already heavily screened by the courts, with baseless claims being dismissed early on.").

[5] Rule 23(f) is working as intended to allow early review of potentially erroneous class certification rulings. Indeed, Rule 23(f) petitions are granted with far more frequency than petitions for certiorari or other petitions for discretionary review. *See, e.g.*, Mark D. Harris and John E. Roberts, *Appealing Class Certification Orders Under Rule 23(f)*, N.Y. Law Journal, Aug. 24, 2015 (25% of Rule 23(f) petitions are granted).

Similarly, the Rules Advisory Committee has promulgated amendments to Rule 23, such as Rule 23(f), to address perceived problems with the Rule.

The various procedural mechanisms available to defendants to challenge unmeritorious class actions explain why "blackmail" settlements are a myth not supported by empirical evidence.[6] To the contrary, a number of recent cases – including this very case and the *Dow* case – directly dispel this myth. Notwithstanding class certification, Tyson chose not to settle the present case and instead took it to trial, just as it did in other recent class actions against it.[7] Dow made the same decision in the urethanes case, in spite of class certification.

Similarly, in another case recently before this Court on a petition for certiorari, *Whirlpool Corp. v.*

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[6] *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1316 (2013) ("We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlements."); Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 698 (2005) ("In sum, the empirical evidence quite simply does not prove up the assertion that class certification applies hydraulic pressure on defendants to settle."); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003) (citing empirical research dispelling the notion that class certification coerces settlement of meritless claims).

[7] *Acosta v. Tyson Foods*, No. 08-CV-86 (D. Neb.) (docket #311) (May 31, 2013) (bench verdict); *Gomez v. Tyson Foods*, No. 08-CV-21 (D. Neb.) (docket #394 and 395) (April 3, 2013) (jury verdict).

Glazer et al., both Whirlpool and various *amici*, including the Chamber, argued that allowing class certification to stand would lead to a "blackmail settlement" because of the "hydraulic pressure to settle" created by the "potentially ruinous liability" posed by a trial.[8] Despite that customary and well-worn hyperbole, after this Court denied certiorari, Whirlpool did *not* settle but instead went to trial and prevailed.[9] In all three of these cases – *Tyson*, *Dow*, and *Whirlpool* – the defendants elected *not* to settle, despite class certification and the supposed inexorable pressure it exerts on defendants to do so.

Adopting unnecessary and sweeping rules to make it difficult or impossible to certify a class out of concern that certification could pressure defendants to settle would leave class members without an effective means of redress even in cases where there has been wrongful conduct. The denial of class certification effectively prevents proposed class members, which in many cases include small businesses, from obtaining relief. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the

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[8] *See* Whirlpool Corporation's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 13-430 & 13-431, Oct. 2013, at 28, 34; Brief of *Amicus Curiae* DRI – The Voice of the Defense Bar in Support of Petitioners, No. 13-430 & 13-431, Nov. 5, 2013, at 5-6, 16, 23; Brief of the Chamber of Commerce of the United States of America, Business Roundtable, and the National Association of Manufacturers as *Amici Curiae* in Support of Petitioners, No. 13-430 & 13-431, Nov. 6, 2013, at 7, 19-21.

[9] *See In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000 (N.D. Ohio Oct. 30, 2014) (docket #490) (jury verdict).

very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action "); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001) (affirming class certification; reasoning that without class certification, numerous "small merchants will lose any practical means of obtaining damages. "). Indeed, "while affirming certification may induce some defendants to settle, overturning certification may create similar 'hydraulic' pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); *see* FED. R. CIV. P. 23(f) Advisory Committee's note (1998) ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation."). This is precisely why it is vital that class certification decisions be made on the facts and the law, not based on how they might influence settlement.

Similarly, the Chamber's professed concern that certifying classes in cases such as this one will somehow harm absent class members by binding them to "class-wide dispositions that are substantially divorced from the merits of their individual claims" is disingenuous at best. Chamber Br. at 19. As the Chamber knows very well, in the absence of class certification, most victims of illegal conduct perpetrated by defendants such as Tyson will never file individually, will recover nothing, and consequently unlawful conduct will not be deterred. *Amchem*, 521 U.S. at

617; *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974); *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("only a lunatic or a fanatic" would litigate the claim individually).[10]

II. Statistical Analysis And Representative Proof Are Appropriate, Including In Class Actions.

The Chamber and other *amici* mount a wholesale attack on statistical averaging and aggregate proof, arguing that "statistical analysis for purposes of litigation is an exercise fraught with peril, as it is often susceptible to manipulation and error." Chamber Br. at 15. But there are already multiple mechanisms under the law for evaluating the reliability of such proof in particular cases – *Daubert* "gatekeeping" under Federal Rule of Evidence 702, summary judgment or directed verdicts, and "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" at trial.

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[10] As one district court has noted:

> There is an irony inherent in defendants' attempts to protect absent class members when their real hope is to deny plaintiffs any recovery. *In Re Diasonics Securities Litigation*, 599 F. Supp. 447, 450-51 (N.D. Cal. 1984) (comparing defendants' concern to that of a fox respecting the safety of a chicken coop). A court, recognizing this irony, must be suspicious of defendants' efforts to protect unnamed plaintiffs when that protection will, as a practical matter, leave them without a remedy. *Kline v. Wolf*, 702 F.2d 400, 402 (2nd Cir. 1983); *In re Computer Memories Securities Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986).

Abelson v. Strong, No. 85-0592-S, 1987 U.S. Dist. LEXIS 7515, at *6 (D. Mass. July 30, 1987).

See, e.g., Daubert v. Merrell Dow Pharms., 509 U.S. 579, 596-97 (1993).

Here, Tyson did not move to exclude this expert evidence based on statistical analysis and averaging under *Daubert*; it litigated that evidence exhaustively on the merits at trial, and it requested judgment as a matter of law after the verdict. In these circumstances, the jury's ultimate resolution, based on the trial record as a whole, is dispositive and warrants deference under the Seventh Amendment on appeal. This is particularly so in the context of the Fair Labor Standards Act ("FLSA"), given this Court's recent recognition that donning and doffing claims involve a "morass of difficult, fact-specific determinations" that warrant deference to the fact-finder. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 881 (2014).

In addition, statistical analysis and averaging are routinely used in a wide range of contexts, including class actions. Indeed, one of the amici supporting Tyson is Wal-Mart Stores, Inc., whose amicus brief takes the extreme position that averaging and extrapolation are "incompatible with due process."[11] However, that contention is squarely contrary to Wal-Mart's stance when it served as lead plaintiff in an antitrust class action on behalf of five million merchants. In that case, Wal-Mart successfully advocated for the use of class-wide aggregate techniques to determine damages, and overcame defendants' due process objections. *Visa Check/MasterMoney*, 280 F.3d at 139-40.

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[11] *See* Brief of Wal-Mart Stores, Inc. as *Amicus Curiae* in Support of Petitioner, Aug. 14, 2015 ("Wal-Mart Br."), at 5.

As noted, a basic premise of the class action rule is that aggregation can serve as a vital means of enforcing certain substantive laws, particularly those involving relatively small claims. *See, e.g., Amchem*, 521 U.S. at 617 (recognizing that class actions "aggregat[e] the relatively paltry potential [individual] recoveries into something worth someone's labor.") (citation omitted); Alba Conte & Herbert Newberg, Newberg on Class Actions § 10:5 & n. 20 (4th ed. 2002) ("[A]ggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objective of Rule 23.").

Aggregate proof is customary and indispensable to establish liability and damages in a wide variety of class, collective, and other actions, from wage and hour[12] to antitrust[13] to consumer[14] to securities[15] cas-

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[12] *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (holding an employee may recover under the FLSA based on representative testimony where the employer's records are inaccurate or inadequate); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (affirming award of "back wages to an entire group of employees based on the testimony of a representative sample . . . of 2.5 percent" of the employees under the FLSA); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1995) (granting back wages under the FLSA "to non-testifying employees based upon the representative testimony of a small percentage of the employees"); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991) (same); *McLaughlin v. HO Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (same).

[13] *See, e.g., In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) (affirming aggregate damages award based on expert testimony); *Linerboard Antitrust Litig.*, 305

(Footnote continued)

es. Absent aggregate proof such as statistical analysis and averaging, the class action device, which is essential to the enforcement of important substantive laws, would be vaporized.[16]

F.3d 145, 153-55 (3d Cir. 2002) (approving multiple regression and benchmark methodologies to prove antitrust impact); *Visa Check/MasterMoney*, 280 F.3d at 138-140, *disapproved in part on other grounds in In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40 (2d Cir. 2006) (affirming district court's decision that "common formula for damages that absent the tie, the interchange fees for off-line debit cards would have decreased, the interchange fees for credit cards would not have increased, and that an individual merchant's damages could be calculated by comparing those fees with the interchange fees actually paid - was not fatally flawed.").

[14] *See, e.g., In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (approving "uniform" class-wide damages methodology proposed by plaintiff: "every purchaser of a tile is injured (and in the same amount per tile) by delivery of a tile that does not meet the quality standard represented by the manufacturer"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-200 (1st Cir. 2009) (approving expert's methodology for calculating aggregate damages: "The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 418-420 (5th Cir. 2004) (approving use of "standardized formulas or restitution grids to calculate individual class members' damages" in case challenging insurance company's practice of paying lower benefits and charging higher premiums to blacks than whites in selling life insurance).

[15] *See, e.g., Basic v. Levinson*, 485 U.S. 224, 242, 250 (1988) (approving rebuttable presumption of reliance supported by the "fraud-on-the-market" theory in order to prevent individualized proof of reliance from impairing enforcement of securities laws).

[16] At a minimum, this Court should refrain from casting any doubt on the admissibility of representative evidence, including "average" data presented by an expert, in any situation beyond

(*Footnote continued*)

III. The Use Of Aggregate Proof Comports With Due Process.

Tyson, the Chamber, and other *amici* argue that "allowing a statistical model to establish liability for an entire class runs a grave risk of violating due process" because "due process requires giving a defendant a meaningful opportunity to present every available defense." Chamber Br. at 17; Brief of Petitioner, Aug. 7, 2015 ("Tyson Br."), at 36. This argument, espoused by many defendants in numerous class actions, is wrong. There simply is no such due process right.

In a comprehensive historical study of the due process theory proffered by Tyson, the Chamber, and other class action defendants, one scholar explains that the theory, which derives from the hoary and long-discredited case of *Lochner v. New York*, 198 U.S. 45 (1905), is entirely misplaced:

> In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action de-

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the specific donning and doffing context at issue in the present case.

> fendants' arguments are rooted in a brief, and brief-lived, deviation from this tradition the Lochner era. If history provides the 'baseline' against which constructions of due process should be tested, class action defendants' claims are losers.

Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 324 & n. 30 (2012); *see also* Newberg at § 10.5 ("Aggregate computation of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.").

As this Court has recognized, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citation omitted). This Court has never recognized any constitutional right to any specific form or method of proof. Such case management decisions lie within the sound discretion of the trial courts, subject to appropriate appellate review. *See, e.g., Holmes vs. South Carolina*, 547 U.S. 319, 326 (2006) (holding Constitution allows rules of evidence that "permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury"); FED. R. EVID. 102, 403.

IV. The Presence Of Uninjured Class Members Does Not Defeat Article III Standing Or Bar Certification Of A Class Or Collective Action.

Tyson, the Chamber, Dow, and other amici also incorrectly argue that the courts below violated Article III standing requirements because uninjured absent class members were included in the class. Chamber Br. at 6; Tyson Br. at 44-49; Dow Br. at 12. Following a comprehensive historical review of representative actions, the Third Circuit recently rejected this interpretation of Article III, holding that "unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing " *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 361 (3d Cir. July 22, 2015).

A contrary rule requiring "individual standing of all class members would eviscerate the representative nature of the class action" and would be "inconsistent with the nature of an action under Rule 23." *Id.* at 364 367. This is because a "class will often include persons who have not been injured by the defendant's conduct." *Id.* at 367 (quoting *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).[17] "Such a possibility or indeed inevitability

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[17] Several other courts of appeals agree that unnamed class members need not establish Article III standing and that class certification is appropriate even where some class members may not have been injured. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements [of Article III]." (citation omitted); *DG ex rel. Stricklin*, 594 F.3d at

(*Footnote continued*)

does not preclude class certification." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) (quoting *Kohen*, 571 F. 3d at 677).

A rule that would require a jury verdict to be overturned and recovery denied to *all* class members if there is even one class member that is uninjured would be unfair and unjust, denying recovery to clearly injured class members. Chamber Br. at 8 ("Prohibiting the certification of classes that include uninjured class members is not merely a fair reading of Rule 23, it is the only permissible one."). Moreover, adoption of such a rule would allow those who have been found liable for violations of the law to avoid the consequences of their wrongdoing, undermining the goal of deterring unlawful conduct.

CONCLUSION

In asking this Court to reverse the Eighth Circuit's decision, Tyson and its *amici* urge this Court to adopt an unduly constricted interpretation of Rule 23 that would call into question the continued viability of the class action device. Because class actions are essential to small businesses and the economy, and because the courts below properly concluded that class certification was warranted in this case, the judgment of the Court of Appeals should be affirmed.

1198 ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.").

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No. 14-1146

In the Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR") is an incorporated, non-profit trade association representing the nation's major freight railroads. AAR members operate approximately 72% of the rail industry's line-haul mileage, produce 95% of its freight revenues, and employ 92% of rail workers. In matters of significant interest to its members, AAR frequently appears before Congress, the courts and administrative agencies on behalf of the railroad industry, including by participating as amicus curiae in cases that raise issues of vital concern to its membership and the judicial system. Like most substantial business enterprises in the United States, AAR's members have been targets of class action litigation and have an interest in ensuring that Federal Rule of Civil Procedure 23 is properly implemented and that the rights of defendants in class actions are preserved. Several of AAR's members are currently defendants in the multi-district litigation consolidated as *In re: Rail Freight Fuel Surcharge Antitrust Litigation* – MDL 1869, No. 1:07-mc-00489-PLF-GMH, in the United States District Court for the District of Columbia, a case that the parties to this litigation have discussed in their briefing to this Court.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than amicus and its members, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed letters with the Court consenting to the filing of any amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court recently explained, Rule 23(b)(3) was "an 'adventuresome innovation' of the 1966 amendments" to the Federal Rules of Civil Procedure, "framed for situations 'in which "class-action treatment is not as clearly called for",'" and in which a class action would not have been permitted under the traditional equity jurisprudence that Rule 23 rests on. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (citations omitted). The Rule permits certification when "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). That provision has proven to be very useful for simplifying litigation in situations where a large number of plaintiffs have suffered "'the same injury'" from the same misconduct. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). But the Rule's appeal in small consumer and investor cases has created an understandable temptation, for creative plaintiffs' counsel and overburdened courts, to bend its requirements and the underlying substantive law to facilitate the resolution of more and more disputes through mass adjudication, at the expense of defendants' rights.

This Court's landmark decision in *Wal-Mart* recognized that trend, and called it to an emphatic halt. The *Wal-Mart* plaintiffs alleged that the company had a "culture of discrimination" against women that resulted in widespread violations of Title VII which could be analyzed statistically and remedied by

injunction. They also proposed to adjudicate individual backpay claims by trying a representative sample of cases, and then extrapolating the outcomes to generate an aggregate recovery for the entire class. It is not difficult to understand why the plaintiffs, and the Ninth Circuit, were attracted to that approach. Wal-Mart is one of the largest employers in the world, and plaintiffs marshaled a plausible case that it was systematically treating its female employees unfairly, for reasons of culture and general corporate policy that could be proven by common evidence. But this Court nonetheless rejected the class certification. Quoting Professor Nagareda's dissection of the Rule 23 case law, this Court recognized that the certification decision in *Wal-Mart* rested on an implicit, but unacknowledged, modification of the substantive requirements of Title VII. *See* 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (hereinafter "Nagareda")). Certainly all female Wal-Mart employees had some "common" experiences, including working for the same company which (allegedly) had a "culture" of discrimination that disadvantaged large numbers of female employees. But working for a company with an allegedly bad "culture" is not itself a violation of Title VII. The real question posed by the substantive law—"*why was I disfavored*," *id.* at 2552 (emphasis added)—was inherently individual and therefore could not be resolved by any class-wide proof, *id.* at 2561. And, critically, Wal-Mart could not be deprived of its right to contest, case by case, whether any particular employment decision was made for discriminatory reasons. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any

substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561 (citation omitted) (quoting 28 U.S.C. § 2072(b)).

This Court's reasoning in *Wal-Mart*, and in the related subsequent case *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), have important implications for several of the most important, long-simmering conflicts in class action law. This case presents an opportunity to correct four closely related misconceptions.

First, many courts have certified classes in circumstances where the plaintiffs' proposed class-wide proof, if believed, would establish injury to *some* class members, but not all. If common proof can establish a widespread legal injury within the class, but cannot identify who has a valid cause of action and who does not, then class certification grants a right to relief to persons who do not have one under the substantive law, or invents a wholly new form of legal rights vested in the class as an entity rather than in individuals. That was the core error this Court identified in *Wal-Mart*, and the Eighth Circuit's decision in this case repeats it. Whether particular employees were paid less than the Fair Labor Standards Act ("FLSA") requires is an individual question that cannot be answered merely by proof that some unidentifiable subset of class members were underpaid, or that the employer's policies would have produced systematic, but not universal, underpayments across the class as a whole. Individual claims cannot be adjudicated on the basis of common evidence unless that evidence genuinely can resolve the issue for *all* class members.

Second, class plaintiffs have been permitted to offer methods of proof that employ averages,

regression analysis, "Trial By Formula" extrapolations from some subset of class members, or other means to smooth out differences that would have been important in individual trials. In *Wal-Mart* this Court explained that an issue is "common" to the class only if the class members in fact suffered "the same injury" and are similarly situated, such that resolution of the issue for one class member will resolve that issue for all "in one stroke." 131 S. Ct. at 2550-51 (citation omitted). It is *always* possible to manufacture commonality by averaging out differences. But Rule 23 does not permit that sort of sleight of hand, and it is not consistent with the Rules Enabling Act, 28 U.S.C. §§ 2071-77, or due process of law.

Third, many courts have focused only on whether the plaintiffs have a theory of common proof that, if believed, would support a prima facie case for all (or perhaps most) class members. But the predominance inquiry under Rule 23(b)(3) also requires serious consideration of the case that *defendants* would be entitled to present if the cases were tried individually. The fact that plaintiffs might plausibly establish a prima facie case with common evidence does not mean that defendants may be forced to defend only by attacking that evidence, and offering competing common proof. When, as here, there are important differences between class members that could contradict the class-wide story that plaintiffs would prefer to tell, the key issues in the case *are not* common in the "one stroke" sense that *Wal-Mart* explained. And if the evidence that defendants would be entitled to present in individualized trials would render a class action unmanageable, the class cannot be certified.

Finally, many courts have held that if liability can be resolved on a class-wide basis, individualized issues going only to the amount of damages should not prevent certification. This Court's decision in *Behrend* squarely rejected that view, holding that a class cannot be certified unless plaintiffs come forward with a methodology for calculating the damages of individual class members that is reliable, measures only the impact of the legal wrong proven, and will not overwhelm the proceedings with burdensome individualized inquiries. And (as with liability) the certification inquiry cannot focus solely on the proof that *plaintiffs* would prefer to present. If defendants come forward with genuinely disputed, triable issues of fact on damages that cannot be resolved without individualized litigation that would render class-wide adjudication unmanageable, the class should not be certified.

ARGUMENT

I. A CLASS MAY NOT BE CERTIFIED UNLESS COMMON PROOF WILL RESOLVE THE CRITICAL LIABILITY ISSUES FOR *ALL* CLASS MEMBERS

As the certiorari briefing explained, there is a longstanding and important conflict in the lower courts about whether a class may be certified when it appears to contain "uninjured" class members. Properly understood, this conflict is another manifestation of issues that this Court has already resolved, decisively, in *Wal-Mart*. A class cannot be certified on the premise that differences among class members that would be important in individual cases will be ignored to facilitate class treatment—particularly when those

differences are so significant that they suggest that some class members have no viable claim or redressable injury at all.

We should begin by recognizing that the problem is not the presence of "uninjured class members" *per se*, but rather relevant *dissimilarities* within the class that could mean that some class members have a valid claim and others do not. Everyone agrees that class certification often will be appropriate even where there is a substantial likelihood that *every* member of the class will turn out to be uninjured. That is true in many properly certified classes because the plaintiffs' common proof fails on the merits. The problem the courts are wrestling with also is not confined to difficulties with proof of "injury," but extends to any reason that might cause the claims of some class members to fail while the claims of others succeed. The debate, in other words, is about whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196-97 (2013) (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The battle is often fought over the issue of individual injury because it is often clear at the certification stage that plaintiffs' *other* liability allegations will stand or fall for everyone on the basis of common evidence. In mass tort cases, for example, whether the defendant was negligent or sold an unreasonably dangerous product are often common questions—but certification usually is inappropriate because injury, cause, proximate cause, and damages raise individualized issues. *See, e.g., Amchem*, 521 U.S. at 624-25.

This problem also arises in securities fraud cases, for example, when a class is defined in a way that includes "in and out" traders or traders who were both long and short, and therefore may have escaped injury or even benefited from the challenged misconduct. *Compare Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir. 2009) (suggesting that such issues can be sorted out at trial), *cert. denied*, 559 U.S. 962 (2010), *with In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1367 (N.D. Cal. 1994) (requiring evidentiary hearing about seller/purchaser conflicts prior to certification). And it comes up in antitrust cases, when it appears that class members would have had opportunities to mitigate or avoid the impact of an alleged violation depending on their individual circumstances. *Compare, e.g., Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 522 F.3d 6, 29 (1st Cir. 2008) (vacating class certification when individual negotiations affected the final price paid), *with Dow Chem. Co. v. Seegott Holdings, Inc. (In re Urethane Antitrust Litig.)*, 768 F.3d 1245, 1254 (10th Cir. 2014) (affirming certification even though "[i]t is true that some of the plaintiffs may have successfully avoided damages"), *petition for cert. filed*, No. 14-1091 (U.S. Mar. 9, 2015).

Some courts, like the D.C. Circuit, rightfully insist that class certification is inappropriate unless the class members "can prove, through common evidence, that all class members were in fact injured by the alleged [misconduct]." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013).[2] But a number of courts—most notably the

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[2] *See also, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (injury must be shown for "every class

Seventh Circuit—have turned that principle on its head and embraced the view that "a class will often include persons who have not been injured by the defendant's conduct" and that certification should be denied only if "it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (same).

There are at least two distinct problems embedded here. First, a plaintiff who concedes he is uninjured or does not have even a plausible claim of injury ordinarily cannot state a claim and lacks Article III standing. Plaintiffs appear to admit in this case, for example, that even under their own theory of proof-by-averaging at least 212 members of the class were not underpaid and have no FLSA claim. So plaintiffs are litigating on behalf of a class that *they concede* contains a very substantial group of persons who do not have even a plausible claim for relief. This is an action *for individual damages*, and unless something extraordinary and unexpected is contemplated for the next phase of the litigation, it appears that the jury's aggregate damages award will be distributed among class members in some manner that does not attempt to distinguish between the injured and the uninjured—or, at least, does not draw that distinction in any way that is rigorous, judicially supervised, and consistent with the due process and Seventh Amendment rights of Tyson Foods. Article III does not permit a federal

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member"); *Blades v. Monsanto Co.*, 400 F.3d 562, 571-74 (8th Cir. 2005) (denying certification where "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy").

court to award damages to a plaintiff that has not suffered an injury in fact, fairly traceable to the defendant's violation of law. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 357-60 & n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established," and "[t]his is no less true with respect to class actions than with respect to other suits."). In addition to that obvious Article III problem, it is hard to imagine a process that improperly modifies substantive rights, in violation of the Rules Enabling Act, more blatantly than one that effectively gives a cause of action and a monetary recovery to putative plaintiffs who lack a cause of action or standing even under their own theory of proof.

Second, the presence of apparently uninjured class members is a blazing red flag that everyone in the class has not "suffered the same injury," *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted), that the key issues cannot be resolved "in one stroke" for all class members, *id.*, and that the proposed class is not "sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623. Something has to explain why within the group that the class plaintiffs contend is homogeneous and commonly impacted, some putative class members would have escaped injury even if the alleged misconduct occurred. If the answer is the stuff of individual trials, *e.g.*, there were ways for putative class members to avoid the impact of the allegedly unlawful practices, one cannot reasonably conclude that individual trials are unnecessary or must give way to the "greater good."

At bottom, the case law about uninjured class members is wrestling with whether (and to what

degree) the perceived jurisprudential or public policy advantages of the class action device can justify ignoring differences between class members to facilitate aggregate resolution of disputes. Many class certification decisions therefore appear to be "driven primarily by vague policy considerations" rather than "actual comparisons of the relative weights of the common questions and the individual questions." *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. at 1352; *Amchem*, 521 U.S. at 622-23 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry." (citation omitted))

But as this Court has reiterated many times, the Rules Enabling Act leaves no room for that sort of balancing. It forbids any interpretation of Rule 23 that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b).[3] Whether proof requirements for individual injury or causation should be relaxed or presumed away, in the interests of facilitating more efficient or widespread compensation and deterrence, is an important issue to be resolved *by the substantive law*. These are precisely the sorts of concerns that, for example, support a presumption of reliance in federal securities law, *see Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988), and that led courts to recognize new theories of liability based on market shares, *e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924, 937-

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[3] This Court has been forced to reiterate that point over and over, in Rule 23 cases specifically. *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2561; *Amchem*, 521 U.S. at 615; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013).

38 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980), and for "medical monitoring" based on exposures to harmful substances when no actual injury has yet manifested, *e.g.*, *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987). Thoughtful observers have pointed out that debates about class certification often are "stalking horse[s]" for similar arguments that the underlying substantive law should be modified in some way that will facilitate class-wide resolution. Nagareda, *supra*, at 130; *see also Mclaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008) ("Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof."). But federal courts are not permitted to reform the substantive law through the Federal Rules of Civil Procedure. A class certification decision that functionally grants a cause of action to persons who do not have one violates the Rules Enabling Act, conceals important changes in the law from legislative debate and oversight, and, when state law creates the cause of action, profoundly exceeds the power of the federal courts. *See, e.g.*, Allen Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1021 (2005) ("[S]uch innovations should be debated and discussed through legitimate democratic channels, and should not be achieved covertly, as they often are now, as an ad hoc incident to judicial attempts to squeeze a square peg of dissimilar claims through the round hole of class certification criteria."); Nagareda, *supra*, at 133-64.

If the substantive cause of action requires proof of individual injury, and common proof will be able to establish that *many* were injured but cannot show injury to all or sort the wheat from the chaff, then by

definition there are "[d]issimilarities within the proposed class" that "impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *supra*, at 132). The key issues in the case *will not* stand or fall, for all class members, "in one stroke." *Id.* This Court held emphatically in *Wal-Mart* that defendants are entitled to litigate those potentially dispositive dissimilarities class member by class member, and that no class may be certified on the premise that defendants will be prevented from doing so. *Id.* at 2561.

Of course there will be cases in which the variation in class members' circumstances lends itself, beyond reasonable dispute, to some easy or formulaic resolution. In some securities cases, for example, it may be possible to identify the uninjured traders (such as net short sellers) through a mechanical analysis of transaction records, with no need or justification for time-consuming individualized evidence.[4] But that possibility must be approached with caution.

The First Circuit recently held that a class may be provisionally certified despite the appearance that a small number of class members may have escaped injury, if the court is "satisfied that, prior to judgment,

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[4] Alternatively, it may be possible to define the class to limit it to those who only bought (and did not sell) the security during the time period in question. But the class must be defined based on clear and objective criteria. Class definitions that attempt to solve these problems with vague qualifiers such as "and who suffered injury thereby" create an impermissible and unascertainable "fail-safe" class. Potential class members cannot readily determine whether they are in the class or not, in order to exercise their opt-out rights. And anyone later determined not to have suffered injury would retroactively drop out of the class definition and would not be bound by the judgment.

it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members" in a way that is "administratively feasible" and "protective of defendants' Seventh Amendment and due process rights." *Astrazeneca AB v. United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 19-20 (1st Cir. 2015). That sounds good in theory. But on closer scrutiny it becomes apparent that the First Circuit had no real theory of how it could be done in *Nexium*, and seems to have shifted the burden to defendants to *dis*prove the possibility. *See id.* at 20-21. The individualized problem in *Nexium*—that some class members undoubtedly would have continued buying the brand-name product rather than the generic out of brand loyalty—is clearly a question of the individual's experience with other generics, their attitudes toward the branded drug, the incentives under their health insurance plan, and the practices of their physician in writing prescriptions and their pharmacist in filling them. That complexity cannot be resolved by any formula. The court of appeals speculated that the millions of class members might satisfy their prima facie burdens with affidavits that "if unrebutted, would be sufficient to establish injury." *Id.* at 20. But if the defendants have a right to "rebut" such affidavits class member by class member, how could the case remain manageable as a class action? The First Circuit also speculated frankly that the problem *might* be solved by modifying the substantive law with a presumption that consumers will always buy a generic when it is available. *Id.* But the court's recognition of the need for such a presumption simply underlines that class certification could never be appropriate without it. In

practice, therefore, the First Circuit's superficially reasonable standard quickly turned into an abdication of the court's responsibility to determine *prior to certification* that the elements of Rule 23 are met and the case can fairly be tried as a class action.

This Court has recognized repeatedly that the certification of a class creates an overwhelming hydraulic pressure on the defendant to settle, even if the claims are fairly weak in substance. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). That dynamic no doubt explains why so many of these critical and obvious questions about Rule 23(b)(3) remain unsettled, a half-century after the 1966 amendments. A class cannot be certified on the premise that the court will figure out *later* whether the case can be tried as a class action, consistent with the defendant's rights. *See, e.g.*, Erbsen, *supra*, at 1047-48.

II. COMMON ISSUES MAY NOT BE MANUFACTURED BY AVERAGING DIFFERENCES ACROSS THE CLASS

Dissimilarities within a putative class also cannot be wished away by averaging out important differences between class members.

The employee plaintiffs in this case spent widely varying amounts of time donning and doffing protective gear, and were paid for that time in different degrees and in different ways. The courts below purported to solve that problem by allowing plaintiffs to determine an "average" donning and doffing time by observing a small subset of employees, and then to win a judgment on the theory that the jury could assume that every class member's experience

was identical to the sampled "average." This is precisely the "Trial by Formula" that this Court disapproved in *Wal-Mart*. 131 S. Ct. at 2560-61. The court below manufactured commonality on the key issues in the case where none existed, and made it impossible for Tyson to hold individual class members to their burden of proving an individual entitlement to relief under the law. *See, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998) (reversing certification and class-wide judgment that had relied on an expert's "abstract analysis of 'averages'"); *Gates v. Rohm & Haas, Co.*, 655 F.3d 255, 266-67 (3d Cir. 2011) (denying certification of tort claims when plaintiffs proposed to prove average exposure to carcinogen).

Contrary to the Eighth Circuit's suggestion, this certainly *would not* be an acceptable way for an individual FLSA plaintiff to prove his claim. If an individual employee brought an action for uncompensated overtime and proffered only evidence that a sample of *other* employees worked uncompensated overtime, that evidence certainly would not suffice to prove his claim. And the defendant would be entitled to attack the relevance of that aggregate proof, by (*inter alia*) cross-examining the individual plaintiff and rebutting his testimony with individualized defensive evidence. In the context of an individual trial, the defendant's argument that the trier of fact should disregard evidence about workers other than the plaintiff would be powerful. By certifying a class and giving explicit judicial blessing to the project of class-wide *aggregate* proof here, the district court inherently deprived Tyson of what would, in individual

cases, have been the most effective defense to this sort of proof.

This Court *did not* endorse this sort of proof-by-averaging in *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946). This Court did say that if the employer has not kept proper and accurate records, the employee can satisfy his burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687-88. The Eighth Circuit latched onto the phrase "just and reasonable inference," but this Court was crystal clear that it applied *only* to proof of the amount of damages, not to liability. "[H]ere we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. *The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.*" *Id.* at 688 (emphasis added). That is a straightforward application of the ancient rule that a plaintiff must carry his burden of proving liability with non-speculative evidence, but is allowed greater leeway for inference on damages after wrongdoing has been established. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

Of course sampling and statistical modeling have their place, and can be powerful and appropriate tools in the class action context just as in individual litigation. But this case illustrates two common pitfalls that the courts must take great care to avoid.

First, the court must be confident that the experiences of individual class members truly are

cohesive, such that the key issues logically stand or fall "in one stroke" for all class members. Because it is *always* possible to manufacture commonality by using mathematical tools that average out (or completely ignore) important differences between class members, the fact that an expert can construct a statistical model or sampling methodology does not itself demonstrate that the requirements of Rule 23 are satisfied. As the ABA guidelines for antitrust cases explain, "it is always possible to perform a regression with the price as the dependent variable and with a variety of independent variables." ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 221 (2005). "[T]his does not mean, however, that impact can be shown with common proof, or that damages can be calculated in a formulaic manner." *Id.* To the contrary, the use of a regression or statistical model "*presupposes*—at least as a matter of economic or statistical methodology—the aggregate unit whose legitimacy the court is to determine." Nagareda, *supra*, at 103 (emphasis added). Basing the certification decision on that proposed proof therefore "exhibits a troubling circularity. The legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess." *Id.* at 126. So it is absolutely critical for the court to scrutinize, rigorously and independently, whether that proposed aggregate unit is in fact cohesive enough that the contemplated modeling, sampling, or averaging can resolve the dispute without modifying anyone's substantive legal rights.

Competing class-wide proof is capable of fairly and fully resolving issues that are genuinely "common"

in the sense explained in *Wal-Mart*. Sometimes that commonality will be supplied by the underlying substantive law, such as when the fraud-on-the-market doctrine dictates a classwide presumption of reliance in securities cases. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013); Nagareda, *supra*, at 116-17. Or it may be clear from the facts, such as in the prototypical antitrust case where every purchaser bought the same fungible product at the same uniform, market-wide price, and the factors bearing on injury and damages are simple and mechanical. But the crucial point, for present purposes, is that Plaintiffs' ability to construct a "plausible" or "workable" sampling methodology or regression analysis *does not* establish that the underlying issues are common in the legally relevant sense.

Second, the proposed model or sampling methodology must reliably capture the full panoply of facts that bear on the issues it addresses and that could be decisive if the class members' claims were tried individually. As Professor Nagareda notes, "the real concern about aggregate proof in class certification lies in its threat 'to conform the law to the proof.'" Nagareda, *supra*, at 104 (quoting *McLaughlin*, 522 F.3d at 220)). That was this Court's concern in *Behrend*, 133 S. Ct. at 1435 n.6, where the damages model failed to account for the geographic effects of "overbuilding," and in *Wal-Mart*, where the disparate-impact study fell short of addressing all relevant Title VII considerations. *Wal-Mart*, 131 S. Ct. at 2555 (rejecting Title VII regression model that did not obviate defendants' rebuttal that its employment decisions were gender-neutral and performance based).

It was also the basis for this Court's separate rejection of the proposed "Trial by Formula" in *Wal-Mart*, where the formulas left out so much important detail that basing decisions on them would have prejudiced the defendant's right to assert individualized defenses. 131 S. Ct. at 2561. That will often be the case when a model obscures important differences among class members, such as through the excessive use of averages, *see, e.g.*, *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003), or when the model fails to consider important factors bearing on liability or damages, *see, e.g.*, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 972 (C.D. Cal. 2012). A court may limit the dispute to a battle of aggregate proofs only upon a finding that the model so reliably and comprehensively captures the underlying facts relevant to each class member's claim that individualized rebuttal evidence can be excluded as irrelevant or repetitive under the Rules of Evidence.

III. A CLASS MAY NOT BE CERTIFIED MERELY ON THE BASIS THAT THE PLAINTIFFS PROPOSE TO LIMIT *THEMSELVES* TO COMMON EVIDENCE

This case also illustrates a third issue that has plagued class action jurisprudence for many years. Many cases (even otherwise rigorous ones) will say that the issue for class certification is whether *plaintiffs* can offer a theory of how to satisfy their burden by common proof—and stop there. *See, e.g.*, *Blades*, 400 F.3d at 566 ("If the same evidence will suffice for each [class] member to make a prima facie showing, then it becomes a common question."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (stating that class certification

requires a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial"). But as this Court emphasized in *Wal-Mart*, the defendants' rights and the defendants' evidence must be considered as well.

In assessing predominance, the "critical need is to determine how the case will be tried." Fed. R. Civ. P 23 advisory committee's note to 2003 amendments; *see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir.) (Rule 23(b)(3) requires the court to "consider how a trial on the merits would be conducted if a class were certified."), *cert. denied*, 540 U.S. 819 (2003); *Hydrogen Peroxide*, 552 F.3d at 311 ("[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." (citations omitted)). Forecasting how the issues will play out at trial requires serious consideration of the evidence that Defendants are entitled to present. If the issues are genuinely common to the class, the trial court will be able to exclude individualized defensive evidence as either irrelevant or repetitive and unnecessary. But when class members are differently situated and individualized evidence is relevant and *not* repetitive, defendants cannot be prevented from presenting that evidence merely because it is inconvenient for class-wide adjudication. *Wal-Mart*, 131 S. Ct. at 2561. *Wal-Mart* eliminates any

misconceptions on that point, although the better reasoned cases have always recognized it.[5]

For that reason, the Eighth Circuit's class certification reasoning in this case would have to be rejected even if it were correct that *Mt. Clemens* permits an FLSA plaintiff to establish a prima facie case entirely with statistics or averages. In an individual case, the defendant would be entitled to respond to such a showing with evidence unique to that employee. The fact that a case can be tried as a class action up through the end of the plaintiffs' case in chief does not establish that the key issues are in fact common or capable of *resolution* through evidence common to the class. It may simply mean that named plaintiffs have strategically chosen to limit their own proofs in order to facilitate class treatment. And as this Court and many have noted, that choice may *harm* absent class members who could have put on a stronger case, subordinating their actual litigation interests to the economic interests of class counsel in receiving the largest fee award for the least effort. *See, e.g., Amchem*, 521 U.S. at 620-21 (noting that genuinely cohesive interests are necessary to ensure "sufficient

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[5] *See, e.g., McCarthy v. Kleindienst*, 741 F.2d 1406, 1413, 1414 n.9 (D.C. Cir. 1984) (holding that certification was properly denied because defendants were entitled to rebut the plaintiffs' proposed common proof with individualized evidence); *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191-94 (11th Cir. 2009) (same); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268-70 (11th Cir. 2009) (same); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

unity so that absent class members can fairly be bound by decisions of class representatives."). This case illustrates the problem vividly. Class plaintiffs' theory of proof extrapolated a supposed *average* donning and doffing time from a limited sample of observations, in which the actual time varied dramatically. Even if the sampling were perfectly constructed, the entire enterprise rests on compromising the claims of those class members whose actual donning and doffing time was greater than average, and giving part of the recovery they deserve to class members who may have had no claim at all, or a claim for far less.

Whether the FLSA should be amended to recognize a new form of group liability in circumstances like these is a question for Congress. The Rules Enabling Act forbids courts from accomplishing that goal *sub rosa*, by pretending that aggregate or average proof offered by the plaintiffs conclusively resolves issues that defendants are in fact entitled to litigate individually.

IV. INDIVIDUALIZED DAMAGES ISSUES PRECLUDE CERTIFICATION

The courts below permitted plaintiffs to seek and obtain a lump sum judgment for the class, as an entity, without resolving the damages that individual class members are, or are not, entitled to. That is not permissible. In many class actions calculating individual damages will be essentially a mechanical exercise once liability has been decided. But if there are genuine, disputed issues about damages that require individualized litigation, a class cannot be certified on the premise that defendants will be precluded from contesting those issues.

The aggregate class-wide verdict sought and rendered here reflects a common, and disturbing, strategy to attempt to neuter the defendants' ability to contest liability and damages case-by-case, and to remove the allocation of damages among class members from the realm of disciplined adjudication to *ad hoc* "claims administration." In *Behrend* this Court held that the class could not be certified without a reliable method of quantifying damages at the individual level. *See Behrend*, 133 S. Ct. at 1434-35. This Court clarified that predominance is a "demanding" inquiry and explained that plaintiffs "[could not] show Rule 23(b)(3) predominance" without a "common methodology" because in a case with so many class members and different damage "permutations," "[q]uestions of individual damage calculations" would "inevitably overwhelm questions common to the class." *Id.* at 1432-35; *see also id.* at 1435 n.6 (referring to "requisite commonality of damages").

The courts below tried to solve that problem by wishing it away—pretending that litigation can end with an aggregate damages figure for *the class*, while leaving questions of individual damages unresolved. That premise is inconsistent with *Behrend*, and with the better reasoned cases going back decades. The Second Circuit has long insisted that this sort of "fluid recovery" procedure "offends both the Rules Enabling Act and the Due Process Clause" and systematically inflates the recovery beyond what the defendant would actually face in individual trials. *McLaughlin*, 522 F.3d at 231-32; *see also Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1008 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). In effect the class itself is

constituted as a legal entity with a cause of action to recover for aggregate injury to its members, modifying the substantive law beyond all recognition.

That flawed procedure cannot be rescued by pretending, as plaintiffs and the courts below did in this case, that all class members are the same as some estimated average. Plaintiffs have always received somewhat more leeway in proof of the amount of damages than in proof of liability, but still have to offer proof of *their own damages*. It is never just and reasonable to infer that everyone is the same, merely because examining the differences would be time-consuming. When all class members are awarded an averaged damages amount, the awards are not even attempting to estimate actual damages. All of them will be too high or too low, except perhaps by sheer luck.

Nor can the problem be solved simply by positing some post-verdict process for dividing the total among class members. Many classes have been certified on the premise that if liability can be established by common evidence, damages issues can be deferred to some undefined future "claims process." But the better reasoned cases have always recognized that where calculating damages "requires separate mini-trial[s] of an overwhelming large number of individual claims, . . . the staggering problems of logistics thus created make the damage aspect of [the] case predominate, and render the case unmanageable as a class action." *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (second alteration added) (citations and quotations omitted) (collecting cases), *cert. denied*, 435 U.S. 968 (1978); *Bell Atl. Corp.*, 339 F.3d at 306-07. Of course defendants cannot simply obstruct class-wide

resolution by insisting on individualized litigation of issues that are unimportant, duplicative, or not reasonably in dispute. In class actions as in individual cases, district courts retain ample discretion to manage and limit the presentation of unnecessary evidence, and to grant motions *in limine* or for summary judgment in order to narrow the issues for trial. But if there are genuinely individualized and disputable issues of fact going to damages, which defendants would be entitled to litigate in individual trials, those issues cannot be banished just because doing so would be convenient.

As a practical matter that may mean that certification is appropriate only when it is clear that once the class-wide issues are resolved damages calculation becomes "virtually a mechanical task, capable of mathematical or formula calculation." *Windham*, 565 F.2d at 68 (citations omitted). If a jury determined based on competent evidence that every member of a class overpaid by $2 per widget, and the number of widgets each class member purchased was not reasonably disputable, damages calculations could be relegated to an administrative process. But if the extent of any class member's damages depend on fact issues that the defendant is entitled to contest with evidence individual to each class member, the specter of mini-trials may become overwhelming. That conclusion is hardly radical. This Court has emphasized over and over again that Rule 23(b)(3) was designed for situations in which the class plaintiffs "'suffered the same injury'" at the hands of the defendant—which does not mean "merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 25521 (citation omitted).

The damages issues in this case are real, individualized, and not at all mechanical. Neither plaintiffs nor the courts below have identified any reliable way to resolve those issues consistent with due process, the Seventh Amendment, and the Rules Enabling Act. Indeed, the premise of the judgment appears to be that those issues will never be resolved—that class members will share equally in an undifferentiated judgment, and Tyson Foods cannot complain that it never had an opportunity to litigate individual questions. That procedure is plainly inconsistent with both *Wal-Mart* and *Behrend*, and should be rejected.

CONCLUSION

This Court should reverse the decision of the Eighth Circuit and hold that the class must be decertified.

Respectfully submitted,

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No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976. Its mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* nor its counsel made a monetary contribution to the preparation or submission of this brief.

of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions.

The abiding interest of *amici* in the proper application of class actions is exemplified by their participation as *amicus* or as counsel for *amici* in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and other cases in this Court.

Amici believe that the decisions of the lower courts in this case are inconsistent with fundamental limits on class actions and the recent teaching of this Court regarding the preservation of class action defendants' due process rights. *Amici* are concerned that the decision below, certifying a class based on estimates of the overtime a hypothetical "average" employee might have worked, includes persons who were not in fact injured, and thus have no entitlement to damages, and deprives a defendant in a class or collective action of the right to litigate and prove all of its defenses to individual claims.

INTRODUCTION

This Court has recently taught that a class cannot be certified unless and until the court concludes, "'after a rigorous analysis,'" that the four prerequisites of Rule 23(a) – numerosity,

typicality, commonality, and adequacy of representation – are met. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S.Ct. 2541, 2551 (2011). In cases in which class certification is sought under Rule 23(b)(3), the inquiry into whether common questions will predominate over individualized issues "is even more demanding." *Comcast Corp.* v. *Behrend*, 133 S.Ct. 1426, 1432 (2013). The predominance inquiry begins "with [an examination of] the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011), and focuses on whether there is "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust*, 133 S.Ct. 1184, 1197 (2013). Adherence to that methodology in this case would have disclosed a "fatal dissimilarity" among class members that would have precluded certification. The lower courts' allowance of the use of an "average" worker and "average" times disguised wide disparities in the amount of time it took different class members to perform the "donning" and "doffing" activities plaintiffs alleged entitled the class to damages for underpayment of overtime wages.

Plaintiffs are hourly workers at a pork-processing facility who sought overtime compensation and liquidated damages under the Fair Labor Standards Act and Iowa law on the theory that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and cleaning personal

protective equipment and walking to and from their work stations. There were significant differences, however, in the types of personal protective equipment individual workers wore, and large differences in the amount of time each worker spent on those activities. There were also differences in the total number of hours individual workers spent on other work activities in any given week, and differences in the amount of time for which Tyson compensated individual workers for donning and doffing activities. Questions of fact whether individual workers were deprived of any overtime compensation, and, if so, how much overtime pay was owed, outweighed common legal questions.

Despite differences among class members admitted by plaintiffs' experts, and despite the admitted inclusion of over 200 employees who were owed no unpaid overtime compensation at all, the district court certified (and later refused to decertify) a class of over 3,300 employees, finding that the legality of the Tyson's compensation system was a common question that predominated over individualized questions of injury or damages. The district court permitted plaintiffs to "prove" classwide liability and damages with purportedly "common" statistical evidence that erroneously presumed that *all* class members were identical to a fictional "average" employee. The use of the hypothetical "average" employee disguised vast disparities among individual workers with respect to the time spent on donning, doffing, and cleaning personal protective equipment, and elided

significant differences in entitlement to any overtime pay and the amount of overtime pay owed.

On appeal, the majority sought to distinguish and skirt, rather than to apply, this Court's recent class certification teaching, particularly *Wal-Mart* v. *Dukes*. *See, e.g.*, Pet. App. at 10a-11a, 13a. The Eighth Circuit panel ignored the many individualized issues bound up in plaintiffs' claims. As the dissenting circuit judge wrote, Tyson was found liable for substantial damages based on an "undifferentiated presentation[ ] of evidence," and the jury announced a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Pet.App. 24a (Beam, J. dissenting).

Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were. This Court's decisions do not permit courts to ignore the factual differences among class members that require individualized inquiry or to use statistics to eliminate the legal significance of such differences solely to allow Rule 23(b)(3)'s predominance standard to be met.

The lower courts' criteria for class certification in this case effectively deprived Tyson of its due process right to raise every available defense and altered substantive rights in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

FACTUAL BACKGROUND

The plaintiffs are hourly employees at Tyson Foods's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, and the substantially identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1, *et seq.*, because Tyson failed to adequately compensate them for all hours worked in excess of 40 hours per week, by failing to pay "time-and-a-half." Plaintiffs assert that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and cleaning personal protective equipment (PPE) and walking to and from their work stations.

The district court permitted plaintiffs to "prove" classwide liability and damages by statistical evidence that created a purely hypothetical "average" employee and presumed that all class members were identical to that hypothetical "average" employee. Plaintiffs' expert, Dr. Kenneth Mericle, computed an "average time" spent by employees to donning, doffing, and walking to and from the production line, based on a time study in which Dr. Mericle observed a small sample of Tyson employees performing what he deemed to constitute donning and doffing activity. Dr. Mericle then extrapolated those sample observations to all employees, and concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which she

worked) on donning, doffing, and walking.[2] Respondents submitted testimonial evidence of the donning/doffing times of only three individual members of the class, but that testimony diverged sharply as between the witnesses and diverged drastically from Dr. Mericle's "average." There were significant differences, however, in the types of personal protective equipment individual workers wore, and differences in the amount of time each worker spent on equipment donning, doffing, and cleaning. There were also differences in the amount of time Tyson compensated individual workers for donning, doffing and cleaning activities, as well as differences in the total number of hours individual workers spent on other work activities in any given week. Thus the damages, if any, to which a worker might be entitled could vary considerably.

Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to determine which employees had worked overtime and, based on Dr. Mericle's construct of the "average" employee time, calculated what she contended was the additional overtime compensation owed by Tyson to the class as a whole.

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[2] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

In the district court, Tyson objected repeatedly to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to the very "trial by formula," eschewed and criticized in *Wal-Mart*, which prevented Tyson from litigating its defenses to individual claims.

The district court nevertheless certified a Rule 23 class of more than 3,300 employees and conditionally certified an FLSA collective action of 444 workers, all of whom are also members of the Rule 23 class, see Pet. App. 110-111a; J.A.117, concluding that the legality of the compensation system was a "common question" that predominated over individualized questions of injury or damages. The trial court denied Tyson's repeated motions to decertify the class.

Mericle's study was fatally flawed for numerous reasons. First, Mericle conceded that his time measurements included employees who performed different jobs and donned and doffed different equipment, J.A.349-350, 351, 383, and that this resulted in "a lot of variation." J.A.387. There were material variations in Mericle's measured time for Processing workers' pre-shift donning of equipment, ranging from half a minute to ten minutes (a 20-fold disparity). J.A.142. For Slaughter workers Mericle observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift (a 28-fold disparity). J.A.143. Mericle conceded that these wide disparities were observed for each "activity"

measured, because "some of [the workers] put on more equipment than others." J.A.385-386.

Second, Mericle made no attempt to ensure that his time study was based on a statistically representative sample of class members. J.A.359. Mericle's study was not based on a "random sample."

Third, Mericle made no effort to control for all the different combinations of equipment worn by individual workers, differences that resulted both from variations in the equipment required for different jobs and differences in optional equipment individual workers chose to wear, id. Mericle conceded that there were wide variations in individual donning and doffing time because some employees were required to wear considerably more personal protective equipment than others and because completion times varied based on the manner in which equipment is donned and doffed and because some employees required considerably less than the "average" to complete the donning and doffing activities.
Fourth, Mericle included in his "average" time spent cleaning knife-related equipment at the end of the shift, *see* J.A.123-124, even though not all employees had to rinse their equipment at the end of their shift. Compare J.A.222 with J.A.226-227.

Fifth, Mericle did not account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or tear down responsibilities. J.A.433. Mericle also included in his computations

employees who donned some equipment once they were on the line and thus already on being paid gang-time. J.A.369.

At trial the actual evidence from the few class members who testified was at odds with Mericle's assumptions, observations and calculations. These witnesses acknowledged that Tyson required employees with different tasks to wear different personal protective equipment, depending on their job; they also confirmed that some employees chose to wear additional or different items, depending on their personal preferences. J.A.276-277; J.A.283-284; J.A.315. Additionally, these workers testified that they donned and doffed pieces of equipment in different sequence, in different places, and that each piece requires a different amount of time to put on or take off. J.A.272, 297-302, 308-309, 318-319, and thus it took each of them a different amount of time to perform each of Dr. Mericle's "activities." None of their donning and doffing times matched Mericle's "averages," and their times were often well below Mericle's "average." *See* J.A. 142-143, J.A.260, J.A.288, J.A.309. On cross-examination each employee revised downward the time estimate he made during direct. See J.A.270-272; J.A.297, 301-302; J.A.316-319.[3]

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[3] The significant individual differences and Mericle's failure to account for them in his study mean that Mericle's average times did not establish whether *any* employee was actually undercompensated.

Plaintiffs' damages expert, Dr. Fox, testified that classwide damages were $6,686,082.36 for the Rule 23 class action and $1,611,702.44 for the FLSA collective action if one assumed, as she did, that every class member took Mericle's "average" times. J.A.410, 417-418; J.A.139. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, and washing equipment, and walking to and from their workstations. J.A.419.

Most significantly, Fox acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included at least 212 workers who suffered no injury at all, because adding Mericle's estimated time to their paid time did not result in those employees working any unpaid overtime. J.A.415. She also testified that if Mericle's average donning/doffing times were reduced, the number of uninjured workers would increase (and the number properly in the class would decrease commensurately) because their work hours fell below 40 for a given week or because they were fully compensated for their time. J.A.424-425.[4]

The jury found Tyson liable for failing to pay required overtime and awarded $2.9 million in

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[4] The Eighth Circuit panel said that "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." Pet.App. at 9a (citation omitted).

damages to the class as a whole, less than half the amount Fox had calculated for the Rule 23 class. J.A.467.

After trial, the district court denied Tyson's renewed motions for decertification of the class and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a. The district court denied Tyson's motions because whether "donning and doffing and/or sanitizing of the PPE. .constitutes 'work'" was a common question susceptible to common proof, Pet.App. 37a, and that there were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id.*

A divided Eighth Circuit panel affirmed. While conceding that "individual plaintiffs varied in their donning and doffing routines," the appeals court held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members worked more hours than the hours for which they were compensated. *Id.* at 12a. The court of appeals rejected Tyson's argument that Dr. Mericle's study was not capable of proving class-wide liability or damages. The circuit court panel majority said that "using statistics or samples in litigation is not necessarily trial by formula," Pet.App. at 10a-11, and citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) for the proposition that the jury could infer both class-wide liability and damages from the study. Pet.App. at 11a-13a.

While recognizing that "individual plaintiffs varied in their donning and doffing routines," Pet.App. 8a, and that plaintiffs "rely on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated work time, Pet.App. at 11a, the majority held that because "Tyson had a specific company policy" and the "class members worked at the same plant and [workers] used similar equipment," this inference is permitted by this Court's decision in *Mt. Clemens*, 328 U.S. 680, 687. Pet.App. at 8a. The majority concluded that applying the average donning/doffing times to individual employee time records "prove[d] liability for the class as a whole." *Id.* at 10a.

Judge Beam, dissenting, pointed out the numerous differences between the class members in donning and doffing times, K-Code payments, abbreviated gang time shifts, and other relevant factors. Pet.App. 23a. He further noted, "While all class members were subject to a common policy – gang-time payment," there was "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because, *inter alia*, the amount of time individual employees spent donning and doffing varied. *Id.* Judge Beam also said that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees, and that by certifying a class with hundreds of uninjured employees, the district court forced Tyson to pay employees whom it had fully compensated. Pet.App. 22a.

SUMMARY OF ARGUMENT

The district court certified the class and collective action, and the court of appeals panel majority affirmed, without conducting the rigorous analysis required by Rule 23 to ensure that the employees were "similarly situated," see *Wal-Mart*, 131 S.Ct. at 2551, and the "more demanding" inquiry under Fed. R. Civ. P 23(b)(3) to ensure that questions of law or fact common to the class predominated over individual questions, see *Comcast*, 133 S.Ct. 1426, 1432.

The courts below erred by allowing plaintiffs to "prove" injury and damages on a classwide basis with statistical sampling that disguised very significant individual differences between putative class members. Plaintiffs were allowed to "prove" classwide liability and damages by applying Mericle's average donning/doffing times to all class members even though those averages do not reflect the actual time worked by any class member. *Wal-Mart* makes it clear that such a "Trial by Formula" lowered plaintiffs' burden of proof and violated Tyson's due process right to raise every available defense, in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

The panel majority mistakenly read *Mt. Clemens* to permit the use of averaging in these circumstances, but *Mt. Clemens* held only that an employee carries his burden of proving entitlement to damages under the FLSA "if he proves that he has in fact performed work for which he was improperly compensated and if he produces

sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. 680, 687.[5] An employee cannot prove that *she* performed overtime work for which *she* was not properly compensated with evidence of the amount of time worked by a hypothetical "average" employee derived from a sample of different employees who performed different work activities and whose activities took different amounts of time to perform. As the Seventh Circuit explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013), that approach confers a "windfall" on some class members while undercompensating others.

The decision below is fatally flawed because the class and collective action includes hundreds of uninjured class members who are beneficiaries of the class judgment. Article III only permits federal courts to provide redress for an "injury in fact" that is traceable to the conduct of the defendant. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The FLSA likewise assigns federal courts the authority to award damages to employees who were injured by working overtime without receiving statutory mandated compensation. 29 U.S.C. §216(b). The *procedural* devices of a class action or collective action do not expand the *substantive* jurisdiction of the federal courts to

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[5] *Mt. Clemens* was an FLSA case, and arguably does not even apply to the much larger Rule 23 class in this case.

provide damages remedies to individuals who have no injury.

Constitutional and statutory standing requirements permit a court to certify a class only if plaintiffs can prove with common evidence that *all* class members were injured, or that there is a mechanism for identifying the uninjured class members and ensuring that they will not recover damages. Proceeding with class litigation in the absence of such showings alters substantive rights and deprives the defendant of its due process right to raise every available defense. In this case, plaintiffs' own damages expert acknowledged that there are hundreds of class members who worked no unpaid overtime and thus were not entitled to any additional compensation.

ARGUMENT

I. A RULE 23 CLASS ACTION MAY NOT BE CERTIFIED ON THE BASIS OF STATISTICAL EVIDENCE THAT DOES NOT ACCOUNT FOR DIFFERENCES AMONG INDIVIDUAL CLASS MEMBERS.

The Eighth Circuit affirmed certification of a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations of work duties, hours worked, and compensation actually received by individual workers, based solely on a study that purported to calculate the amount of time it took a hypothetical "average" employee to don and doff work equipment and to walk to and from the production line, based on observations of a small

sample of employees. The "average" was at odds with the testimony of the workers who actually appeared as witnesses at trial. That holding cannot be squared with *Wal-Mart*.[6]

To obtain class certification in a case seeking damages, the class representatives must demonstrate that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3).

A "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S.Ct. at 1432 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)); *Wal-Mart*, 131 S.Ct. at 2550 (same). Accordingly, a party seeking to maintain a class action must be prepared to show that the numerosity, commonality, typicality, and adequacy- of-representation requirements of Rule 23(a) have been met, and courts must conduct "'a rigorous analysis'" to ensure that plaintiffs can satisfy the requisites of Rule 23(a) – *i.e.*, that there "are *in fact* sufficiently numerous parties, common

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[6] In a class action, a defendant cannot typically raise individualized defenses. A defendant is not permitted to conduct discovery on each class member's individualized issues, and such discovery would frustrate the rationale behind Rule 23. It is not feasible to call hundreds or thousands of class members at trial; doing so would also be inconsistent with the rationale for class actions, but judicial economy cannot trump constitutional rights.

questions of law or fact," typicality of claims or defenses, and adequacy of representation. *Wal-Mart*, 131 S.Ct. at 2551-52 (emphasis in original).

Wal-Mart made it clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a) and Congress added "procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast* at 1432 (citations omitted). Rule 23(b)(3) imposes a "duty [on courts] to take a close look at whether common questions predominate over individual ones." *Ibid.*

Meeting the predominance requirement entails more than adducing common evidence; the plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the same acts or omissions of defendant. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011). The determination whether "'questions of law or fact common to class members predominate'" cannot be made if the requirements to prove the underlying claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Amgen*, 133 S.Ct. 1184, 1197 (2013).

Plaintiffs argued, and the lower courts agreed, that the different amounts of time individual workers spent donning and doffing personal protective equipment did not foreclose class treatment, because plaintiffs could prove their case using the averages derived from Mericle's study.

The testimony of plaintiffs' own experts shows in this case that such "fatal dissimilarities" exist in this case – both as to actual donning and doffing activities and times, and as to actual underpayment, if any. In this case, the evidence is that the time devoted to donning, doffing, and walking by workers varied considerably from employee to employee, depending on numerous variables. As plaintiffs' damages expert agreed, whether that donning/doffing/walking time entitled an employee to overtime pay depends on

whether that employee otherwise worked 40 or more hours during the week in question and whether he was already paid for that time. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, the amount of damages.

Plaintiffs' own evidence shows that there was substantial variance in the amount of time individual class members spent in donning, doffing, and cleaning personal protective equipment each day. The three class members who provided "representative" testimony at trial testified that each wore different items and spent different amounts of time, ranging from more than two minutes to almost 12 minutes on donning/doffing activities. See J.A.317-319; J.A.266-267; J.A.287-288.

Mericle, plaintiffs' principal expert witness, testified that there were "different [times] for every single person. [he] measured." J.A.387. Mericle's time study shows wide variations in the amount of time employees spent donning and doffing different equipment. On the Processing floor, for example, employees spent between 0.583 minutes and 10.333 minutes donning equipment in the locker room before the shift began(an almost 1800 percent variance), and between 1.783 minutes and 9.267 minutes doffing and storing equipment after the shift ended (a 520 percent variance). See J.A.142. On the Slaughter floor, employees spent between 2.1 and 13.28 minutes donning equipment in the locker room pre-shift (a

632% variance), and between 1.967 and 5.517 minutes doffing and storing equipment post-shift (a "mere" 280 percent variance). See J.A.143.[7]

These factual differences raise numerous individualized issues that clearly predominated over any common factual or legal questions about the calculation of the hours in employees' "workweek." The relevance of individualized damages issues to Rule 23(b)(3)'s predominance requirement is critical; it is a key threshold question in cases in which certification of a damages class is sought. If plaintiffs fail to present a viable method of calculating damages on a classwide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," precluding certification. 133 S. Ct. at 1433 See *Comcast*, 133 S.Ct. at 1433. In *Comcast*, this Court held that an antitrust class action was "improperly certified under Rule 23(b)(3)" because plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis" and thus the plaintiffs could not "show Rule 23(b)(3) predominance." 133 S. Ct. at 1432-33. We submit that the damages model proffered by plaintiffs in this case, and accepted by the courts below, also

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[7] In addition, some class members were paid to come in before or stay after gang time to set up or clean the production line, and they may don and doff their protective equipment during the set-up or clean-up time for which they are paid, adding further variation in time worked or time paid.

failed to prove damages either for any individual or for the class.

The existence of these individual issues should have precluded class certification. The lower courts erred in failing to recognize the impact and significance of these "'fatal dissimilarit[ies],'" *Amgen*, 133 S.Ct. at 1197, in the predominance determination under Rule 23(b)(3) and the "similarly situated" determination under the FLSA.

Plaintiffs' statistical evidence disguised the vast individual differences and thus did not "prove" injury and damages for any class member. These averages were "proof" only nothing more than the injury and damages "suffered" by a hypothetical plaintiff, unmoored from any evidence of actual injury to any real human.

It is for reasons such as these, we submit, that *Wal-Mart* makes it clear that determining a defendant's liability to a class by extrapolation from the average of a sample is a flawed approach that cannot be used to avoid individual inquiries and thereby to aggregate thousands of individual claims in a single class action. Such a "Trial by Formula" impermissibly abridges a defendant's rights under the Due Process Clause and the Rules Enabling Act, 28 U.S.C. §2072(b), requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." *Wal-Mart*, 131 S.Ct. at 2561.

In individual trials, Tyson could respond to a plaintiff's claim for unpaid donning and doffing

time by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore, or Tyson could show that the plaintiff was compensated for time spent donning and doffing.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet.App. 10a; see also *id.* at 13a. This distinction is illusory. Although plaintiffs' expert Dr. Fox added the average donning/doffing times to the class members' actual time records, the average times were the essential "fact" to prove liability – whether any individual class member worked more than 40 hours without receiving overtime compensation – and the amount of damages. Thus here, as in *Wal-Mart*, classwide liability was based on extrapolation and the erroneous contention that each class member spent the same "average" amount of time donning, doffing, washing, and walking. As in *Wal-Mart*, there was no individualized inquiry into whether individual class members were actually injured and, if so, the amount of damages to which they were entitled.

The court of appeals majority upheld plaintiffs' use of averages on the theory that drawing "inference[s]" from such evidence was "allowable"

under *Mt. Clemens*. Pet.App. 8a. The panel, we submit, misread *Mt. Clemens*. This Court in *Mt. Clemens* held that certain "preliminary activities" and the time necessarily spent walking from the time clock to the work bench were compensable work. 328 U.S. at 692. The Court therefore reversed the court of appeals, which had denied damages for the preliminary activities because it thought plaintiffs had failed to prove "the extent of overtime worked." *Id.* at 686. The Court deemed this an "improper standard of proof." *Id.* An employee "has the burden of proving that he performed work for which he was not properly compensated," but the "employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated. and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. .[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 686-88. Recovery of "uncertain and speculative damages" is precluded "only to situations where the *fact of damage* is itself uncertain" and the "*uncertainty lies only in the amount of damages*." *Id.* at 688 (emphases added). The Court therefore remanded "for the determination of the amount of walking time involved and the amount of preliminary activities performed. .and calculating the resulting damages." *Id.* at 694.

In the case at bar, averages and inferences, rather than direct evidence, were used to prove that each class member performed work for which she was not properly compensated as well as the measurement of the time expended to perform that work.[8]

Certifying the class in this case deprived Tyson of the ability to litigate defenses to individual claims. When the district court held that Tyson's liability to the entire class depended on whether Tyson paid sufficient overtime to the hypothetical

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[8] As Judge Posner explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 775, extrapolation from a sample is an accurate measure of other class members' unpaid overtime only if everyone in the class has the same duties that take essentially the same amount of time to perform, which is *not* the case here. The Seventh Circuit held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776. The Seventh Circuit rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class" because, inter alia, no random sampling had been performed. *Id.* at 774. To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held would require that all 2341 "have done roughly the same amount of work. . ." *Id.*

Mericle admitted that his study in this case was not a "random sample," J.A.359. The "variance" between the lowest times and the highest times were so great that an "average" was misleading. Moreover, in the instant case, the "sample" testimony did not square with Mericle's data points.

"average" employee, Tyson could not avoid liability by demonstrating that class counsel had failed to show that specific class members were inadequately compensated.

The Eighth Circuit's certification of the class is not consistent with *Wal-Mart*. As this Court explained in *Wal-Mart*, class certification under the circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), this Court held "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*[9]

II. CLASS CERTIFICATION WAS IMPROPER BECAUSE ARTICLE III's INJURY-IN-FACT REQUIREMENT WAS NOT SATISFIED BY ALL CLASS MEMBERS.

Article III permits federal courts to provide redress only for actual injuries that are fairly traceable to a defendant. *Lujan v. Defenders of*

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[9] The FLSA authorizes a collective action by one or more employees to bring "in behalf of himself or themselves and other employees similarly situated" to recover "unpaid minimum wages, or their unpaid overtime compensation" 29 U.S.C. §216(b). The requirement that the plaintiffs be "similarly situated" to the employees they seek to represent should require an analysis similar to that under Rule 23(b)(3). *See Espenscheid*, 705 F.3d at 772. In this case, the district court certified a Rule 23(b)(3) class (for litigation of the Iowa state law claims) and a collective action (for litigation of the FLSA claims), and both were tried together.

Wildlife, 504 U.S. 555, 560; see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) and *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996) (judiciary's role is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). "First, and foremost, there must be alleged (and ultimately proven) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual and imminent, not 'conjectural' or 'hypothetical.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103 (1998) (citations omitted).[10] Article III "injury-in-fact" requirement must be satisfied at each "stag[e] of the litigation." *Lujan*, 504 U.S. 555, 561 (1992). "Courts have no power to presume and remediate harm that has not been established," and "[t]his is no less true with respect to class actions than with respect to other suits." *Lewis* v. *Casey*, 518 U.S. at 357-58 & 360 n.7; see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23 "'requirements must be interpreted in keeping with Article III constraints.'") (quoting *Amchem*, 521 U.S. at 612-13).

Rule 23 class actions may aggregate only claims that could be brought individually. This Court has consistently held that class certification cannot provide a right to relief in federal court that the Constitution would deny them if they sued separately. *See, e.g., Philip Morris USA Inc. v.*

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[10] The FLSA similarly requires that an employee establish that her "damage is . . . certain." *Mt. Clemens*, 328 U.S. at 688.

Scott, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Amchem*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III's constraints.").

In this case, the Eighth Circuit majority upheld certification of a class and collective action that included hundreds of plaintiffs who were not injured and allowed them to collect damages. As shown above, plaintiffs' damages expert admitted that the class includes at least 212 employees who were not injured because they did not work *any* unpaid overtime even if they worked the average time claimed in Mericle's study.

As Judge Beam observed in his dissent from the court's denial of rehearing, the district court's "lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due to the limited number of members of the certified class with provable damages" and "[n]either the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom." Pet. App. 126a.

The desire for judicial economy override compliance with the standing requirements of Article III and also violates the rule that the Federal Rules of Civil Procedure "do not extend"

the "jurisdiction of the district courts." Fed. R. Civ. P 82; *see Amchem*, 521 U.S. at 613.

CONCLUSION

The rulings below are inconsistent with due process, Article III, the Rules Enabling Act and the FLSA and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF BRAUN AND HUMMEL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former Pennsylvania employees ("Employees") of Wal-Mart Stores, Inc. and Sam's Club ("Wal-Mart") who experienced systemic wage theft by Wal-Mart during the period 1998 through 2006. In 2002, Employees filed a wage-and-hour class action against Wal-Mart in Pennsylvania claiming, among other things, that Wal-Mart's centralized "Preferred Scheduling System"—which staffed the stores not by the man-hours required to do the job but instead by the total wage expense necessary to improve store profits year-to-year—imposed such payroll pressure and understaffing that hourly employees had to work through their promised paid breaks and off-the-clock.

After Employees prevailed at trial, in the Pennsylvania Superior Court, *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. 2011),[2] and in the Pennsylvania Supreme Court, *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014), Wal-Mart

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[1] Letters of consent from the parties to the filing of all *amicus* briefs have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, nor did any person or entity other than *amici*, their members, or their counsel make a monetary contribution to its preparation or submission.

[2] Michelle Braun and Dolores Hummel were named representatives of separately filed plaintiff classes, consisting of Wal-Mart employees and making similar allegations. The two class actions were consolidated for trial in the Pennsylvania courts.

filed two petitions for certiorari in this Court,[3] claiming that Employees' reliance on Wal-Mart's own employment and wage policies, as well as its regularly maintained business records and internal audits, somehow denied the company due process and that allowing the jury to draw an adverse inference from the period when Wal-Mart stopped keeping those records, specifically in anticipation of litigation, amounted to an improper "Trial by Formula," arguments emphatically rejected by the Pennsylvania Supreme Court. *Id.* at 665. Those Petitions are still pending before this Court.

Remarkably, Wal-Mart has filed an *amicus curiae* brief in support of Petitioner Tyson Foods, Inc., that elides Wal-Mart's own spoliation of evidence and unabashedly argues that arithmetic extrapolations from existing corporate time records may never be used by employees—whether individually, collectively, or in a class action—to prove the hours for which the employees were not paid.

To rebut Tyson's and its *amici's* misstatement of what actually happens in these cases and Wal-Mart's imaginative retelling of its experience in Employees' litigation, Employees submit this *amicus* brief.

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[3] The largely identical petitions seek certiorari separately from the decision of the Pennsylvania Supreme Court (No. 14-1124), as well as an issue decided by the Pennsylvania Superior Court (No. 14-1123) that the Pennsylvania Supreme Court declined to take up.

INTRODUCTION AND SUMMARY OF ARGUMENT

Wage theft happens. Tyson tells this Court that "Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were." Pet. 4. But the damages owed by Tyson here have nothing to do with Federal Rule of Civil Procedure 23(b)(3). Instead, the damages arose out of substantive labor law principles that permit a "just and reasonable inference," where, as here, an employer has failed to keep "adequate and accurate" records of all hours worked. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub. L. No. 49-52, § 5, 61 Stat 84, 87 (May 14, 1947) (codified at 29 U.S.C. § 216(b)).

Had Tyson maintained such records for all donning and doffing work times, as they are required by law and a permanent injunction to do, the parties would have had precise and individualized quantification of the wages owed to each worker. Tyson's failure to keep such records meant that the workers, individually and collectively, had to present substitute evidence of the uncompensated work times. Had each of the workers proceeded with an individual case, they each would have had to provide the same substitute evidence—a time and motion study—to meet the "just and reasonable inference" standard. Presenting that same study in replicated proceedings before 2,300 separate juries at 2,300 separate trials would not and could not implicate Rule 23(b)(3), as Tyson would nevertheless contend that the time and motion study was flawed and could not be used. Hence, Tyson's real complaint is not

about Rule 23(b)(3) or the class proceedings below; it is about the Court's jurisprudence under *Anderson*, and the adverse inferences courts and juries are permitted to draw from an employer's failure to keep records of all hours worked. This Court should not interpret Rule 23 to alter or abridge these longstanding and oft-stated principles of civil damages law, particularly as they apply to labor law.

Thus, Petitioner and its *amici* misstate the issues involved in this case. Properly understood, the sole issue is one of federal and state labor law, to wit, whether an employer who fails to keep adequate or accurate records of employee work times may prevent those employees—whether individually or in the aggregate—from relying on an industrial engineering study to provide a "just and reasonable inference" that the employee performed work for which he or she was improperly compensated. Such replicated proof, rather than mask differences among employees, instead supplies substituted evidence of work from which a factfinder may or may not infer improper compensation by the employer. An interpretation of Rule 23 that would prohibit such proof would, in fact, alter substantive labor law and run afoul of the Rules Enabling Act, 28 U.S.C § 2072(b) (the "rules shall not abridge, enlarge or modify any substantive right").

In this respect, Tyson and its *amici* do not and cannot dispute that Tyson had the duty to maintain adequate and accurate records of employee work times, including donning and doffing time. *See, e.g.*, Iowa Code Ann. § 91A.6 (employer required to maintain and preserve records of all hours worked); 29 U.S.C. § 216 (same); *Reich v. IBP, Inc.*, No. 88-2171, 1996 WL 137817, at *9 (D. Kan. Mar. 21,

1996), *aff'd sub nom., Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) (issuing permanent injunction to predecessor owner of Tyson's plant to maintain accurate time records of employee donning and doffing activities); *Anderson*, 328 U.S. at 686-87. Tyson and its *amici* also do not and cannot dispute that Tyson's records of donning and doffing time for each of the class employees were "inaccurate or inadequate," as ordered in *Reich* or described by this Court in *Anderson*, 328 U.S. at 687. Indeed, Tyson conceded below that the four minutes of K-code time did not cover the donning and doffing of all protective gear and certain walking time. JA 121-22, 176, 439-40. Thus, the question for each of the class employees, assuming each proceeded individually, was whether he or she could rely on a standard time and motion study—used every day by countless industries—to meet the employee's burden to show "that he has in fact performed work for which he was improperly compensated as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687. This is and was a question of substantive labor law and evidentiary burdens of proof having nothing to do with class certification procedures.

As a matter of substantive law, penalizing employees (whether individually or in the aggregate) for the absence of accurate time records would only encourage employers to fail to keep proper records. *Id.* Nothing prevented Tyson from rebutting Respondents' proof at the trial below, as it was free to call its own experts and even absent class members to show that Respondents' study was flawed or inadequate to supply a "just and reasonable inference." The class posture of the case had nothing to do with these trial realities, and

ought not mask Tyson's real attack on *Anderson* and its progeny.

ARGUMENT

I. When Employers Spoliate or Fail to Maintain Business Records, an Adverse Inference Is Required.

Tyson and its *amici* ignore the fact that there were two principal questions at issue below: (1) was the line-prep, donning and doffing time (beyond four minutes) compensable work?; and (2) assuming such time was work, how much time over the four minute K-code time did an employee work for which he or she was not properly compensated?

The first question was a common, predominating question regardless of whether any employee took more than four minutes, because if it was not work, no one could ever recover. If it was work, then the only issue would be how much time did it take? *See Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding that preliminary and postliminary activities "integral and indispensable" to the employee's principal activity constitute "work"); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012) (holding that "the *Steiner* test is applicable to issues of donning and doffing at the beginning and the end of work shifts in the poultry processing industry"); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (same). Because this "work" issue was both common and predominating, there can be no dispute that the lower courts properly certified the classes under both Rule 23 and 29 U.S.C. § 216(b). Indeed, Tyson's Questions

Presented impliedly concede this point by admitting that some members of the employee class performed "work" for which they were not compensated.

The second question of "how much work time" ordinarily would have been a "mechanical," arithmetic task—"not for a trier of fact but for a computer program"—had Tyson kept accurate and adequate records of the donning and doffing time. *See, e.g., Johnson v. Meriter Health Servs. Employee Retirement Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Had Tyson kept such records, they would have been introduced and summarized as business records at trial, and Tyson would then have had to challenge or rebut its own payroll records. Such a challenge also would have presented a common, predominating issue under both Rule 23 and 29 U.S.C. § 216(b). *See Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 966-67 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014) ("In light of these [business] records, it would not be difficult to determine USSA's liability to individual plaintiffs, nor would it be overly-burdensome to calculate damages," creating a common, predominating issue whereby the class "will prevail or fail in unison").[4]

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[4] In *Braun*, the Pennsylvania trial and appellate courts recognized and held that a corporation's challenge to its own payroll records clearly presents a common, predominating question having a common answer in classwide proceedings. *See Braun*, 24 A.3d at 936-37, 945-46 ("'It is unusual in the extreme for Wal-Mart, who relies on their records for business purposes to contend that although required by law to be created and maintained, their records are so unreliable that they cannot constitute prima facie proof of their contents.'" (quoting trial court opinion)). *See also Salvas v. Wal-Mart Stores, Inc.*, 893

Because Tyson did not keep records, a "just and reasonable inference" based on substitute evidence was required. Subjective, faded memories from the employees might supply some inference, but a properly constructed study (of the time it usually takes to do something) would provide a "just and reasonable inference." An industrial engineering study of time and motion thus could be offered by each employee (whether this was a class action or not) to prove the "how much," as set forth in *Anderson*. Hence, the attack on the time and motion study has nothing to do with class certification issues.

If each of the employees would rely, necessarily, on the same time and motion study, and if the flaws of that study would be the same whether the class was certified or not, then the issue of the study's adequacy to calculate the "how much" would be identical for all and would predominate for all, so as to justify one proceeding to test the inferences, if any, arising from the study. The "how much" question, therefore, concerns issues of proof under substantive labor law not class certification. Dissimilarities among class members are beside the point, because the real issue was and is: what is the usual time it takes to do something (*e.g.*, drive from Boston to New York; prepare a hard-boiled egg; commute by train from New York to Washington,

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N.E.2d 1187, 1205-06 (Mass. 2008) ("Business records have a special place in our law of evidence. Wal-Mart's business records at issue in this case satisfy all of the requirements to be afforded the usual presumption of reliability."); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007) (same).

D.C.)?[5] With records, different circumstances on each day would, of course, be measured precisely, but the

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[5] In this respect, the arguments about "dissimilarities" among class members reflected in the *amicus* brief of the "Civil Procedure Scholars" are both mistaken and extra-textual. They are mistaken because the usual time it takes to perform a task like donning and doffing protective gear is an evidentiary question, not a Rule 23 question. Because Tyson employees rotated through different jobs, JA 210, 234-236, the time and motion study provided a "just and reasonable inference" that the employees were, in fact, underpaid, regardless of whether the study was admitted in individual as compared to representative proceedings.

The arguments are extra-textual because Rule 23(b)(3) requires "predominance," not "resolvability," as argued by the *amicus* brief. *See* Civ. Pro. Scholars Br. 5-23; *see also* Alan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1080 (2005) (arguing that dissimilarity among class members and their claims is significant and that "resolvability" should be the test for class certification). The difference is significant because "predominance" does not alter or abridge substantive labor law but "resolvability" does.

Where the same challenges to and alleged flaws of the time and motion study would be raised in each of 2,300 individual wage and hour cases (given the absence of any Tyson records), the issues raised by the challenges and alleged flaws undoubtedly "predominate," making one class proceeding far superior to 2,300 individual and redundant trials. If Rule 23(b)(3) were amended to instead require "resolvability," any study, projection, or extrapolation of the usual time it takes to perform a task would necessarily overcompensate the fast and undercompensate the slow without materially changing the defendant's net liability. Yet, such a test would alter

wrongdoer who failed to keep the records should not prevail due to the absence of such records. As the Court has stated repeatedly, "it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury it has itself inflicted." *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (citations and internal quotation marks omitted).

Common substitute proof, *e.g.*, an industrial time and motion study, to supply inferences is appropriate where an employer has failed to keep adequate and accurate time records just as an adverse inference is appropriate where an employer has affirmatively spoliated such records. That was and is the case in *Wal-Mart Stores, Inc. v. Braun*, Nos. 14-1123 & 14-1124. There, extrapolations from pre-spoliation time records were performed primarily because Wal-Mart purposefully stopped keeping records during the pendency of wage and hour class actions, specifically to prevent their use in litigation. *See* No. 14-1123, Pet. App. 285a ("evidence at trial clearly revealed that the corporate response to class action lawsuits filed in many states was to cease all record keeping for rest break periods"). This Court has recognized that all courts have the inherent authority "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). An adverse inference from such spoliation is such a sanction, one that allows the judge as gatekeeper to determine whether to permit the

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and abridge the substantive "just and reasonable inference" standard by mandating individualized actual proof, which conflicts with *Anderson*.

factfinder to determine the appropriateness of its application.

Spoliation occurs when evidence is not preserved, and "litigation is 'pending or reasonably foreseeable.'" *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). *See also Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). The sanction for such misconduct "should be designed to" deter future spoliations, "place the risk of an erroneous judgment on the party who wrongfully created the risk," and "restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). After all, "[i]t has long been the rule that spoliators should not benefit from their wrongdoing." *Id.*

This Court has regarded the destruction of documents in anticipation of litigation to be spoliation "of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination." *The Bermuda*, 70 U.S. 514, 550 (1865). The types of sanctions for spoliation "include dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoliation inference.'" *Vazquez-Corales v. Sea-Land Serv., Inc.*, 172 F.R.D. 10, 13 (D.P.R. 1997) (citation omitted); *see also Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 513 (6th Cir. 2014) (same). The "most frequently-awarded issue-related sanction is deeming facts established for purposes of the

litigation." Jamie S. Gorelick, *et al.*, *Destruction of Evidence* § 3.16, at 111 (2015).

No circuit and no state supreme court has ever suggested that an adverse inference instruction raises a due-process concern. Instead, all are plainly comfortable with such a sanction. *See, e.g.*, *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002). Moreover, courts consistently find that "holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction." *Kronisch*, 150 F.3d at 128.

In Employees' action against Wal-Mart, pending before this Court, Wal-Mart attempted to thwart Employees' proof of their claims by changing its time-keeping records to stop recording employee breaks. The internal company emails and other corporate records attached in the Appendix to this Brief show that Wal-Mart changed the "Break and Meal Period Policy to eliminate punching out and in for breaks because they have received a class action lawsuit by some opportunistic lawyers to recover many millions of dollars on behalf of the 'thousands' of associates who 'regularly' have their breaks cancelled with no make up break granted." Ex. A, reproduced from record in Nos. 14-1123 & 14-1124, R. 4264a-4266a; *see also* Exs. B & C, R. 4263a & R. 9231a. The trial court in *Braun* instructed the jury that it could draw an adverse inference from Wal-Mart's spoliation of evidence, and Wal-Mart did

not object to or appeal from the adverse inference instruction. *See* No. 14-1123, Pet. App. 285a.

That Wal-Mart, "the nation's largest private employer" (Wal-Mart Amicus Br. 1), would intentionally spoliate evidence to thwart wage and hour claims by its hourly employees implicates the issues raised in the instant appeal. Where employers fail to maintain, cease keeping, or otherwise spoliate records of all hours worked by employees, employees must be able to rely on an adverse inference to establish their wage-theft claims. This rule should apply whether the claims are litigated individually, collectively, or on an aggregate basis through a class action. A contrary rule would penalize hourly employees, discourage the retention of corporate time records, and reward the destruction of evidence.

These spoliation principles animate the Court's jurisprudence under *Anderson* and its progeny, all of which emphasize that an employer has the duty to keep "adequate and accurate" time records, and that employees may prove damages in the absence of such records based on "just and reasonable inferences" from substitute evidence. Hourly employees should not be punished where, as here, an employer has failed to fulfill its statutory and court-ordered duties.

II. This Court Has Applied a "Just and Reasonable Inference" Standard for Damages in Dozens of Different Cases, Including Class Actions, for More Than 100 Years.

The "just and reasonable inference" standard is not confined to wage-and-hour claims. In fact, the

Court has relied on the standard in countless contexts, including antitrust, consumer, commercial, and even criminal cases.

For example, in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Court said that "where the defendant by his own wrong has prevented a more precise computation, the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Id.* at 264 (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931); *Eastman Kodak Co. v. S. Photo Material Co.*, 273 U.S. 359, 377-79 (1927)); *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 573 & n.31 (1990)). The Court explained that the "principle is an ancient one, *Amory v. Delamirie*, 1 Strange 505 [King's Bench, Lord Pratt, CJ (1722)], and is not restricted to proof of damage in antitrust suits." 327 U.S. at 265. According to *Bigelow*, the ancient common-law principle has been applied in a multitude of contexts because "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *Id.* "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." *Id.*

In *Hetzel v. Baltimore & O.R. Co.*, 169 U.S. 26 (1898), the Court discussed and applied similar principles in the context of a trespass and nuisance action in which a railroad illegally installed tracks

that blocked a property owner's access to and sale of her property. Because the illegally placed tracks prevented any offers for the lot, the plaintiff had to estimate her damages, which the lower courts rejected, awarding just nominal damages of "one cent." This Court reversed, observing that "absolute certainty as to the damages sustained is in many cases impossible." *Id.* at 37. According to the Court, the rule in all civil actions for damages, whether based on tort or contract, is not that damages be proved "with the certainty of a mathematical demonstration," but instead be "founded upon inferences legitimately and properly deducible from the evidence." *Id.* at 38.

This Court applied the same principles and expressly approved of extrapolations to prove damages in *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 376-79 (1927). In that case, the Court upheld a jury verdict that found damages based on "the profits earned by the plaintiff during the preceding four years in which it had been a customer of the defendant," concluding "that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent, and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference." *Id.*

In the same context, the Court has since emphasized that it is important not to "blur[] the distinction between the liability and damages issues." *Texaco*, 486 U.S. at 572. And, many lower courts have applied the same principles in the context of criminal, antitrust, and similar wage and hour cases. *See, e.g.*, *United States v. Sharp*, 400 Fed. Appx. 741, 745-46 (4th Cir. 2010), *cert. denied*, 562 U.S. 1272 (2011) (approving use of random sampling

and statistical analysis of over 15,000 Medicare claims in Medicare fraud prosecution of osteopath); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 533-35 (6th Cir. 2008), *cert. denied*, 556 U.S. 1152 (2009) (finding expert market evidence, though discounted by the jury, was sufficient to support damages award and did not result in a "fluid recovery"); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1272, 1277 (11th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) (upholding jury verdict in favor of hourly workers, holding that "[t]he jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence").

All of these authorities make clear that the ancient, common-law standard of "just and reasonable inference" for the proof of damages is wholly distinct from the procedural reach of Rule 23 and the collective action principles of § 216(b). The standard is one of substantive law that should not be altered or abridged by a unique or novel interpretation of a procedural rule. Whether some Tyson class members in theory may be undercompensated by the aggregate damages award while others are overcompensated does not detract from the fundamental principle that the damages on the whole inflicted by Tyson were and are supported by a "just and reasonable inference" from an industrial time and motion study properly admitted in evidence and considered by the jury, just as 2,300 separate juries could consider the same study in awarding individual damages. In fact, there can be no doubt that all members of the Tyson class will be bound by the judgment below, so any dissimilarities among them are wholly irrelevant and have no effect on *res judicata*. *See Cooper v Federal Reserve Bank*, 467 U.S. 867, 881 (1984); *Hansberry v. Lee*, 311 U.S.

32, 43-44 (1940); *Fayerweather v. Ritch*, 195 U.S. 276, 302 (1904). How the aggregate damages are ultimately allocated to employee class members is, therefore, no concern of Tyson's, and cannot provide a basis for vacating the jury verdict and judgments below. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves.").

III. Where Employers and Businesses Regularly Rely On Business Records, Class Claimants May Also Rely On Such Records as Proof at Trial.

Employers throughout the country create and retain a wide range of business records to comply with or receive benefits from federal and state tax laws, employment laws, and other laws. Employers routinely rely on their own personnel records and a range of other business records to successfully defend against actions filed by their employees. And while workers commonly rely on their employers' records to prove their employment-related claims, they usually have a *far greater* need to discover and proffer employers' records as evidence, because employers ordinarily have exclusive access to the relevant records, while workers ordinarily have the burden of proving that their employers violated the law.

When workers seek to vindicate their rights collectively, it is vital that they can rely on their employers' business records to prove their claims. In *Braun*, the Employees relied on millions of existing Wal-Mart business records to establish the wage violations. *Braun*, 106 A.3d at 660-61 (explaining

"[a]t trial, Dr. Baggett testified that he had been provided the hourly employee time clock, rest break, and payroll records for all 139 Wal-Mart stores in Pennsylvania for the period from 1998 through early 2006, which amounted to 46 million individual shifts."). The Pennsylvania Supreme Court specifically held that

> the now-disapproved "trial by formula" process at issue in *Dukes* was not at work here, because there was no initial or prior adjudication of Wal-Mart's liability to a subset of employees that would then be extrapolated to the rest of the class [T]he evidence of Wal-Mart's *liability* to the entire class for breach of contract and WPCL violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits.

Id. at 665 (emphasis in original). Where an employer destroys, corrupts, or fails to maintain payroll records required by law, it should not receive a procedural ruling that would preclude substitute evidence or an adverse inference.

In actions seeking to recover lost wages or employee benefits, employers' payroll and other business records are often capable of answering common questions for all class members.[6] Thus, it is

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[6] *See, e.g., Alvarez v. City of Chicago*, 605 F.3d 445, 449 & n.1 (7th Cir. 2010) (reversing the denial of certification and dismissal of federal overtime collective action and noting that the individual facts in "payroll and

unsurprising that "numerous courts have found that wage claims are especially suited to class litigation—perhaps the most perfect questions for class treatment—despite differences in hours worked, wages paid, and wages due." *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 359-60 (E.D.N.Y. 2011) (internal quotations and citations omitted) (granting certification of class alleging prevailing wage violations and concluding "a class action is the most efficient way to resolve the same claims at issue here" as "plaintiffs may calculate class damages by applying a common formula to data culled from defendant's electronic records").

A. Statistical evidence is routinely admitted in class actions.

Parties frequently use statistical evidence to support factual findings as well. Of course, the opposing party has the opportunity to challenge these findings by contesting the methodology employed to reach the conclusions, but these

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time records" will determine how much individual class members are owed); *Morgan*, 551 F.3d at 1239, 1277 (affirming jury verdict in favor of class of employees who used employer's payroll records to establish that they "routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each Plaintiff" and noting that the business records introduced constituted "good old-fashioned direct evidence"); *U.S. Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 780 (6th Cir. 1995) (holding payroll records undermined employer's claim that it had paid its restaurant workers the minimum wage); *Sperling v. Hoffman-La Roche*, 24 F.3d 463, 472 n.16 (3d Cir. 1994) (noting that "employers generally have business records containing the vital statistics and work histories of their past employees").

challenges are common to the class. When properly compiled and described, such evidence is routinely admitted. In class actions and complex business disputes, such evidence is often the only feasible way for the fact finder to answer certain questions. Litigants commonly rely on aggregate, statistical evidence in a variety of areas of the law—such as securities, antitrust, and commercial litigation—and the courts, juries, and parties are capable of comprehending and using this evidence in civil litigation. Precluding the use of this evidence would deny factfinders access to an important category of evidence frequently used in courtrooms across America, as well as in science and business every day. And because the underlying data are admissible, the alternative would be admission of the very same evidence, sliced into individual strands, in an endless series of individual trials, along with the other common evidence. Therefore, both fairness and efficiency mandate the approach taken by trial courts in conducting a single class action relying on the same types of evidence typically used in individual cases and class actions.

The use of statistics has been overwhelmingly endorsed by courts, by the Federal Judicial Center, and by commentators. *See, e.g.*, *Manual for Complex Litig.* § 11.493 (4th ed.) (use of sampling acceptable in pretrial procedures). For example, an aggregate approach to class damages is well established. *See In re Neurontin Antitrust Litig.*, Nos. 02-1830 & 02-2731, 2011 WL 286118, at *10 (D.N.J. Jan. 25, 2011) (collecting authority approving aggregate class damages); *Meijer, Inc. v. Warner-Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 312 (D.D.C. 2007) (approving aggregate approach to class damages).

Statistics have been used successfully in myriad class cases, as well as non-class cases. The leading commentator on class action jurisprudence explains:

> Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually[] will not withstand analysis.

3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.5, at 483-86 (4th ed. 2002). This commonsense logic is borne out across the spectrum of different types of litigation.

1. Wage and hour.

In *Brinker Restaurant Corp v. Superior Court*, 273 P.3d 513, 546 (Cal. 2012), the California Supreme Court reiterated that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Id.* (citing *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010)) (certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence); *Bell v. Farmers Ins. Exchg.*, 9 Cal. Rptr. 3d 544, 578 n.32 (Cal. Ct. App. 2004) (relying on Reference Guide

on Statistics in the Reference Manual on Scientific Evidence in upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability); *Sav-on Drug Stores, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 906, 918 n.6, 923 n.12 (Cal. 2004) (noting with approval the use of statistical sampling in overtime compensation and aggregate techniques in other cases). The *Brinker* Court observed that "statistical inference offers a means of vindicating the policy underlying [applicable state law] without clogging the courts or deterring small claimants with the cost of litigation." 273 P.3d at 546; *see also id.* (encouraging "a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts").[7]

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[7] Tyson relies on *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), as prohibiting all time and motion studies—even for an individual wage and hour claim—because Tyson says they are based on a "*fictional 'average' employee*" and that "approach confers a 'windfall' on some class members while 'undercompensating' others." Tyson Br. 20 (quoting *Espenscheid*, 705 F.3d at 774). But Tyson over-reads the case, which did not involve an industrial time and motion study or any expert analyses. The technicians in *Espenscheid* were not line-workers at a processing plant; they were "more like independent contractors" who "spend the work day installing and repairing satellite equipment at customers' homes and are paid on a piece-rate basis—so many dollars per job—rather than being paid a fixed hourly wage." *Id.* at 772. Because the installers had to keep and report their own work times, and because they each did different types of installations

2. Employment discrimination.

Statistics are also routinely admitted in employment discrimination cases. As discussed in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court reaffirmed that plaintiffs may establish a pattern or practice of discrimination under Title VII through the introduction of statistical evidence, and courts continue to certify Title VII classes based on statistical and other evidence. *See, e.g., Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012); *see also Lavin-McEleney v. Marist College*, 239 F. 3d 476, 481 (2d Cir. 2001) (allowing statistical sampling to show gender-based salary disparity for both liability and damages).

3. Antitrust.

It is a settled practice for courts in antitrust class actions to rely on classwide aggregate techniques in calculating individual damages awards without individualized hearings of class member claims. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d at 533-35 (affirming jury verdict where plaintiffs "provided evidence of a class-wide

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and repairs each day, the court faulted class counsel for not providing a workable trial plan from which a factfinder could infer whether and how much work the technicians had performed for which they were not compensated. *See id.* at 776. Without a study or at least a random sampling of technicians, the court said, "a shapeless, freewheeling trial" would result. *Id.* By contrast, the Tyson processing plant workers here presented the exact type of expert-based study and trial plan that was missing in *Espenscheid*.

aggregate injury."); *In re Neurontin Antitrust Litig.*, 2011 WL 286118, at *10 (collecting authority holding that "the use of an aggregate approach to measure class-wide [antitrust] damages may be appropriate").

One prominent example is *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96 (2d Cir. 2005), where Wal-Mart was a named plaintiff and served as a class representative for approximately five million other merchants. *Id.* at 101. In that case, the Second Circuit approved Wal-Mart's use of a statistical formula to calculate damages, despite potential differences in individual circumstances. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), *disapproved in part on other grounds by In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40, 42 (2d Cir. 2006). Ultimately, Wal-Mart secured a $3 billion settlement for itself and its fellow class members. *Id.*

4. Securities.

Courts also routinely employ classwide, formula-based techniques to calculate individual damages in securities class actions. *See* 3 *Newberg on Class Actions* § 10:8. The large volume of trades and the difficulty of identifying each security purchaser make precise individual damages determinations infeasible or impossible. Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 Law & Contemp. Probs. 105, 106 (2001). Given the large numbers of class members involved in many securities class actions and the correspondingly large number of shares and transactions at issue, requiring individual proof of damages would imperil enforcement of the nation's

laws against large-scale securities fraud. Thus, securities cases regularly involve aggregate damages awards based on class-wide statistical analyses. *See, e.g., Harmsen v. Smith*, 693 F.2d 932, 945-46 (9th Cir. 1982) (aggregate damages need not be proved to a "mathematical certainty").

5. Consumer.

Similarly, courts regularly approve aggregate techniques for computing classwide damages in numerous consumer class actions. For example, in *Smilow v. Southwestern Bell Mobile System, Inc.*, 323 F.3d 32 (1st Cir. 2003), the First Circuit rejected a defendant's argument that damages should not be calculated based on its computer records and analysis through a "mechanical process." *Id.* at 40 & n.8. Other courts agree. *See, e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir. 2004) (insurance rates); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1115 (5th Cir. 1978) (credit card charges); *Occidental Land, Inc. v. Superior Court*, 134 Cal. Rptr. 388, 393 (Cal. 1976) (in bank) (developer fraud); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (stating that "Rule 23 allows district courts to devise imaginative solutions to problems created by individual damages issues" and affirming trial court's certification of a class of 17 million class members).

6. Housing discrimination.

Statistical evidence plays a critical role in housing discrimination cases. In cases brought under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, this Court recently approved the use of statistical evidence, when combined with a defendant's policy or

practices that cause a disparity, to establish liability for disparate impact. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015). In fact, "[t]ypically, a disparate impact is demonstrated by statistics, and a *prima facie* case may be established where gross statistical disparities can be shown." *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011) (internal citations and quotations omitted).

7. Businesses use statistical evidence in litigation.

Even conventional commercial litigation often involves damage determinations based on aggregate proof. *See, e.g., MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 958 N.Y.S.2d 647 (Tbl.), 2010 WL 5186702, at *13 (N.Y. Sup. Ct. 2010) (approving plaintiff's request to analyze samples of loans in support of allegations that defendant misrepresented the origination and quality of loans); *I4I Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 855 (Fed. Cir. 2010) (affirming calculation of damages in patent case based in part on responses from 46 businesses out of 988 surveyed, which were "randomly selected from a database of 13 million U.S. companies"); *Ratanasen v. State of Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993) (approving "the use of sampling and extrapolation as part of audits in connection with Medicare and other similar programs, provided the aggrieved party has an opportunity to rebut such evidence").

8. Businesses use statistics every day.

The use of statistics and other aggregate proof in class actions is not only commonplace and well-accepted, but it also mirrors how companies, in conducting business, handle information and make decisions. For example, "Wal-Mart's internal audit department used TPERs [Time Clock Punch Exception Reports] and TCARs [Time Clock Archive Reports] to conduct internal audits of employees' compliance with the rest-break policies. If the audits revealed violations of the policies, then managers or employees could be subject to discipline up to and including termination." *Braun*, 24 A.3d at 885, *aff'd*, 106 A.3d 656. Wal-Mart relied on the same records to dock employee pay electronically if the employee was late by just "1 minute" in returning from a break, *see id.* at 915-16, while it failed to pay anything if the employee missed or was shorted for her break, despite the records expressly recording "TOO FEW BREAKS," "SHORT BREAK," and "TOO FEW MEALS." *See* Ex. D, reproduced from record in Nos. 14-1123 & 14-1124, R. 8644a-8647a. The courts in *Braun* all correctly held it was proper for Employees to rely on such payroll records to prove their claims, as Wal-Mart itself relied on the same business records. *See* 24 A.3d at 915-16, *aff'd*, 106 A.3d at 665.

B. Tyson waived its objection to statistical evidence and had the opportunity to cross-examine class members.

Tyson had every opportunity to treat its current issue—damages—separately from liability to prevent confusion that aggregation of damages

would automatically follow class-wide liability. In fact, at trial, the plaintiffs requested bifurcation of the proceedings between liability and damages. Pet. App. 112-13. On the basis of Tyson's objection, *id.* at 115, the court denied the plaintiffs' request, so all issues were tried on a unitary basis. *Id.* at 112-13. Because Tyson made a tactical decision to oppose bifurcation, it cannot now complain that the failure to bifurcate has deprived it of "the opportunity to challenge each class member's claim to recovery during the damages phase." *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015); *see also Amgen, Inc. v. Connecticut Ret. Plan & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3) does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." (Emphasis in original; internal quotation marks and alterations omitted)).

While due process guarantees an opportunity to present a defense "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the right is not unbounded and must still be an opportunity "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Here, Tyson had that opportunity, chose not to take advantage of it, and cannot now complain that the Constitution provides a basis for correcting a tactical choice it now regrets. As Justice Scalia wrote, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). The fundamental rule is that a party

"may not complain on appeal of errors that he himself invited or provoked." *Harvis v. Roadway Express Inc.*, 923 F.2d 59, 60 (6th Cir. 1991); *Kriner v. Dinger*, 147 A. 830, 832 (Pa. 1929) (same).

Tyson further claims it was denied due process because it was unable to cross-examine each class member, arguing such individualized examinations would have been available if individual trials, rather than a class action, occurred. Tyson Br. 37. But nothing prevented Tyson from calling as many class members as witnesses as it chose to. Perhaps recognizing that, Tyson complains it was not "feasible to call hundreds or thousands of class members at trial" and that "discovery on each class member's individualized issues" would not be allowed. *Id.* at 37-38. But Tyson's complaints misapprehend the enterprise that Rule 23 sets in motion and ignore the fact that the opt-ins under § 216(b) were before the court and were subject to discovery. In truth, Tyson's tactical decision at trial was not compelled by Rule 23 or § 216(b), because Tyson would undoubtedly contend in 2,300 separate trials that examinations of all the workers were required to rebut Respondents' study, which is the real focus and necessary import of Tyson's appeal.

Despite the frequent refrain about the need to examine every member of a class to mount every possible defense, corporate defendants never undertake such an examination of even a small number of class members. For example, in Employees' case pending before this Court on Wal-Mart's petitions for certiorari, despite designating more than 130 witnesses on its witness list and, on the weekend before trial, identifying more than one hundred more, *Wal-Mart*, No. 14-1123, Pet. App.

270a n.4, and despite the absence of any ruling preventing it from calling those witnesses, Wal-Mart made a strategic decision to call only 12 fact witnesses (only one of whom was a class member) and two expert witnesses (out of eight retained experts), yet still inaccurately told this Court that it was deprived of the "right to rebut [plaintiffs' evidence] through an individualized showing that a particular break was not in fact missed or was missed as a result of a voluntary decision by that employee." *Wal-Mart*, No. 14-1123, Pet. 3. The disconnect between the trial tools absolutely available to class-action defendants and their later post-trial complaints is all too real. Class certification does not deprive a defendant of its ability to mount every possible defense, only the defendant's strategic decisions do.

IV. Trial Courts Must Have Sufficient Discretion to Control Redundant Evidence Given Common Proof of a Corporate-Wide Practice.

The judiciary historically has had discretion to control the types and amount of evidence permitted at trial. Many courts have held that trial courts must have the authority to control the nature and types of evidence presented, the course of proceedings and the avoidance of repetitive or redundant testimony. *See Commonwealth v. Laird*, 988 A.2d 618, 636 (Pa. 2010); *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 29, 39-41 (Pa. 2011), *cert. denied*, 133 S. Ct. 51 (2012). Whether there is or should be a constriction of these discretionary powers based on the procedural form of the action or the substantive nature of the claims implicates public policy choices that are between the judicial and legislative

branches. *See* Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 389, 392 (2012) (questioning whether "Congress ought to have the choice about how class claims can be proven" and arguing that due process arguments of class action defendants lack any historical or textual support, except for two repudiated cases from the discredited *Lochner* era).

A constitutional or other constriction on the historic discretionary powers of the courts would impact, necessarily, all forms and stages of action whether they be criminal or civil, at preliminary or class certification hearings, during pre-trial discovery or motions *in limine*, or in connection with mid-trial evidentiary decisions or requests for jury charges. *See Reyes v. Netdeposit LLC*, No. 14-1228, 2015 WL 5131287 (3d Cir. Sept. 2, 2015) (quoting Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897, 1898 (2014)) ("District Courts sometimes exercise discretion in defining the parameters of the class definition and deciding when subclasses are necessary, often acting independently of any proposals made by the parties."). As other courts have recognized, this Court's *Dukes* decision did not "work[] some sea change in class action jurisprudence." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 482 (D. Kan. 2012). The *Dukes* Court emphatically did not establish or define a new due process right for defendants. Rather, it emphasized the statutory right of employers, expressly provided by Congress in Title VII, to assert the "individual affirmative defense" of "lawful reason," and found that a procedure that short-circuited that individual statutory defense ran afoul of the Rules Enabling Act. 131 S. Ct. at 2561. The *Dukes* Court only

discussed due process in the context of *class member rights* to notice and the opportunity to opt-out. *Id.* at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.").

Our jurisprudence has emphasized that due process applies to both parties, and often requires a balancing test to ensure that both sides have a fair chance to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 343-48 (1976). "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334. In this respect, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (class actions are most appropriate where class members' claims would be "uneconomical to litigate individually"); *Kelly v. Cnty. of Allegheny*, 546 A.2d 608, 612-13 (Pa. 1988) (same); *Salvas*, 893 N.E.2d at 1213 (same); *Iliadis*, 922 A.2d at 718 (same).[8]

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[8] *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 & n.8 (1974) (internal citation and quotation marks omitted):

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes

The cases Wal-Mart musters for a different due process standard are off-point. For example, the court's observations in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (Wal-Mart Amicus Br. 10), hinged on the varying reasons a class member may have purchased Light cigarettes and their impact on the element of reliance. *See id.* at 232.[9] Of course, reliance was not an issue below, as Tyson's K-code system was the uniform source of the wage violations. Wal-Mart's citation of *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (Wal-Mart Amicus Br. 16), is equally mistaken because the unitary trial of the common issues below was not infected by a "hodgepodge" of various and conflicting legal theories as in that case. *See id.* at 342-52. Similarly, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (Wal-Mart Amicus Br. 9-10), concerned the sole issue of ascertainability of class membership where the defendant had no record

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> involving all of our citizens or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods. When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

[9] This Court contradicted *McLaughlin*'s reliance analysis in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 655 (2008).

of class members' purchases. Other circuits have rejected *Carrera*'s unique approach,[10] and Wal-Mart nowhere contends that the class members were unascertainable from Tyson's payroll records.

In sum, Tyson's attack on Respondents' industrial engineering study is not a class certification issue, as Tyson would raise the same arguments had 2,300 separate trials occurred, all of which would have relied on the same study because Tyson violated its duty to maintain adequate and accurate payroll records. Tyson's attack is really directed at the substantive "just and reasonable inference" standard, and this Court should not alter or abridge that substantive law with a procedural ruling under Rule 23.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and deny the Petitions for Certiorari in *Wal-Mart Stores, Inc. v. Braun*, Nos. 14-1123 and 14-1124.

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[10] *See Rikos v. Proctor & Gamble*, No. 14-4088, 2015 WL 4978712, at *22 (6th Cir. Aug. 20, 2015) ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts."); *Mullins*, 795 F.3d at 671 ("the Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23").

September 29, 2015

Respectfully submitted,

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APPENDIX

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Appointment Request from Nancy Bass to Andy Wilson, *et al.*, Sept. 29, 2000, R. 4263a 6a

Minutes of Staff Meeting, Oct. 2, 2000, R. 9231a 7a

Timeclock Punch Exception Report, Store 8160, May 30, 2000, R .8644a-8647a 9a

Exhibit A

Reproduced from record in
Nos. 14-1123 & 14-1124, R. 4264a-4266a, for the
Court's convenience.

From: Paul Ratziaff
Sent: Monday, December 04, 2000 4:51 AM
To: Allen Plant
Cc: Roland Boudreau; Nancy Bass
Subject: RE: Break and Meal Policy CPD-07
Sensitivity: Confidential

Allen: Proceed with communicating and securing our interests. Thanks. Paul

---------Original Message---------
From: Roland Boudreau
Sent: Saturday, December 02, 2000 12:25 PM
To: Paul Ratzlaff
Subject: RE: Break and Meal Policy CPD-07
Sensitivity: Confidential

I support Al's position.

Roland Boudreau
Sr. Vice President Operations
Wal-Mart Canada Inc.
905-821-2111 ext. #4128
905-821-8391 fax
rboudre@wal-mart.com

---------Original Message---------
From: Paul Ratziaff
Sent: Thursday, November 30, 2000 10:30 AM
To: Roland Boudreau
Subject: FW: Break and Meal Policy CPD-07

Sensitivity: Confidential
Roland: The US is changing their Break and Meal Period Policy to eliminate punching out and in for breaks and to eliminate the published policy language that the associate is entitled to a full break later if their regular break is interrupted. They are doing this because they have received a class action lawsuit by some opportunistic lawyers to recover many millions of dollars on behalf of the 'thousands' of associates who 'regularly' have their breaks cancelled with no make up break granted. The US wanted us to make the same policy and procedure changes, largely so that the SMART programming would not have to be different for Canada. Al has researched and we do not support this request. You'll see his answer below. FYI. Paul.

---------Original Message---------

From:	Allen Plant
Sent:	Thursday, November 30, 2000 10:09AM
To:	Nancy Bass
Cc:	Paul Ratzlaff; Greg Muzingo; Dean Dolan; Bryan Miller – Int'l People; Robbie Wasserman
Subject:	Break and Meal Policy CPD-07
Sensitivity:	Confidential

Hi Nancy:
Thank you for the heads up on the likely policy and procedure change relative to the Break and Meal Period (CPD-07).

I have had this issue researched in our legal department and solicited opinion from Personnel Managers in some of our larger Stores.

We are of the strong view that the policy should note be changed by removing the requirement that Associates "punch" in and out for break periods in Canada for the following reasons.

1.) There is no legal exposure in any jurisdiction in Canada similar to that faced in Colorado. The various Provincial Employment jurisdictions each have an "Employment Standards Act" setting minimum standards for employees to follow with regards to all employment obligations including breaks and meals. Wal-Mart [4264a] Canada and in fact most employers provide standards that far exceed what is set out in the various Acts. In fact even if Wal-Mart were to refuse a break as set out in the policy, in many cases may still exceed the employment standards minimum for breaks. Nevertheless there are mechanisms provided to employees by which they would register complaints with the Employment Standards Branch of the Labour Board. Accordingly, because Employment Standards Commissions have jurisdictions over matters such as this it is highly unlikely that a court would even hear a complaint relating to an employers alleged breach of its obligations with regard to its policy and/or the Employment Standards Act.

2.) It is extremely rare, as we believe it should be, that Management would as or require an Associate to suspend their break in any event. We would consider that if there were a case that this was happening on a regular and/or perpetual basis it would be cause for serious concern from a scheduling perspective and an Associate Relations perspective.

3.) The Timeclock Exception Report (SAS1040R) is an extremely useful tool for our Personnel Managers to

Manage Associates who are not following proper guidelines. In fact this report is most often used in evidence to support a misconduct coaching for time fraud. The administrative time spent by Personnel Managers in a large store is approximately 3 to 5 minutes daily, and the report is anywhere from one to three pages long. You suggested that for some stores in the U.S. this report was printing "15 feet long" This is not happening in Canada and we believe its because we have been managing the report on a daily basis and addressing issues as they happen.

4.) We strongly believe that the removal of the Associate obligation to "punch" in and out for breaks would result in a significant increase in time fraud and other inconsistencies and would most definitely give rise to productivity loss and increased administration costs in managing and monitoring Associates break times.

5.) As I indicated on our telephone call, I believe that if this policy were to be reformed as suggested, and at a later date was to be reinstated in its present form for the reasons listed above or other business reasons, this would represent a significant Associate Relations concern.

6.) With respect the provision in policy CPD-07 that requires Management to compensate Associates for the entire break and allow for an additional break or meal period when breaks or meal periods are interrupted, in our view acts as a disincentive for Managers to interrupt an Associates break in the first place. We would be prepared to remove this provision nevertheless if so directed

(See below policy provision highlighted)

Interruption of Break and Meal Periods
Supervisors and management may not require nor request associates to perform work during their break and meal periods, except in extreme emergencies where no other associate is available.

Hourly associates whose break or meal period is interrupted to perform work will receive compensation for the entire period at their regular rate of pay and be allowed an additional break or meal period

You indicated that the suggested policy changes do not necessarily have to apply to Wal-Mart Canada. I recommend respectfully that Canada's policy (CPD-07) remain as is.

Your respectfully
Allen Plant
Associate Relations
People Division
Wal-Mart Canada

This E-mail (including any attachments is intended for the use of the individual or entity to which it is addressed and contains information that is privileged and confidential. If the reader of the E-mail (including any attachments) is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of same is strictly prohibited. If you have received thi E-mail (including any attachments) in error, please notify the originating sender by telephone and reply by E-mail at the [4265a] above-noted address and delete and destroy both the reply and the original E-mail (including any attachments).

Exhibit B

Reproduced from record in Nos. 14-1123 & 14-1124, R. 4263a, for the Court's convenience.

APPOINTMENT

Organizer: Nancy Bass

Required Attendees: Andy Wilson, Charlyn Jarrells; Deborah Kass; Jeffrey Reeves; Kevin Harper; Mark Shaffer; Nancy Bass; Nancy Wetmore; Ramona Truax; Randy Rogers

Subject: Special Meeting of the Policy Committee

Start Date: 09/29/2000 16:30:00 (GMT-06:00)
End Date: 09/29/2000 17:00:00 (GMT-08:00)

Show time as: Busy
Importance: Normal
Location: Andy Wilson's office

There is a law suit in Colorado that involves our Break and Meal Period Policy, PD-07. We need to meet for a short time to discuss proposed changes in this policy to assist our efforts in the suit and minimizing potential future litigation. Charlyn will give us the details at the meeting. I will be routing to you today the policy with the proposed changes.

Thank you for your help!
Nancy
x38326

WMIA-CC
PX 50

WMCa-000032-001-00009149
CONFIDENTIAL

Exhibit C

Reproduced from record in
Nos. 14-1123 & 14-1124, R. 9231a, for the Court's convenience.

STAFF MEETING OCTOBER 2, 2000
CONFERNCE ROOM B
7:00 a.m.- 9:00 a.m.

(All RPM's Present. Covered w/Jessica 10/2/00)

Clubs up for Selection (No selection today)
((For Randy) RPM candidates.
(GM only) • name • club • survey • length of service)

Agenda

- Need a clear understanding of our "next in line" for co-mgr. positions. Re: promotable assistants (surveys, wats, relocatability)
- RPM candidates
- Bill: update the people remiplis
- TAPS: 9175, some clubs want it left open per Randy
    - Oct. 23 new program going – ALL posters down
    - Get info job on TAP's bills that had been previously paid
- Break/Meal Period – interrupted PD-07
    - $550M lawsuit on Wal-Mart b/c of 1400 exceptions
    - Wal-mart will be eliminating clocking in/out for breaks

(open door issues re not getting breaks and/or lunches interrupted)

- Verify fall college recruiting attendance

- Ethics summary – Aug. hrs. to 1st contact/Aug. hrs. to close (below expecations)

(caps from Betty)

- Client satisfaction survey
- Mgmt. terminations – email Wanda compensation issues for mgmt. leaving
- Doppler clubs resurveyed – doppler clubs dates backed to Oct. 13th
- MIT's go to $29,500 after training / RPM must be involved in all money offers
- Area mgr. minimum is $75K

(Run Query for <$75 for area 1 MIT's)

(For area <$75 for MIT's)

Betty –

- Project Calendar*
- Maintaining I-9s*

Ulonda

- Working on wage survey info
- New club needs to have GAP turned on

Confidential WM-MN-9999-602190

PLAINTIFF'S EXHIBT 134

DEPOSITION EXHIBIT 30 Sherrill

Exhibit D

Reproduced and excerpted from record in Nos. 14-1123 & 14-1124, R. 8644a-8647a, for the Court's convenience.

[Note: This is an excerpt of the Timeclock Punch Exception Report for Wal-Mart Store 8160 for May 30, 2000. Several columns containing department and individual identifying information have been deleted to allow space for the pertinent information contained in the columns excerpted below.]

WAL MART STORES, INC.

Run On: 05/31/2000 at 09:20:45 TIMECLOCK PUNCH EXCEPTION Store: 8160 Report: saa1130r

For Period Ending: 05/30/2000 FROM 05/30/2000 TO 05/30/2000

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*6335	Long Shift	9:02	8.50	0741	0757	0:16	1058	1129	0:31						
	Too Few Breaks														
*7679	Long Break	8:17	7.69	1134	1157	0:23	1308	1336	0:28						
	Too Few Breaks														
*5580	Too Few Breaks	8:14	7.74	0807	0822	0:15	1156	1226	0:30						
*2237	Too Few Meals	8:00	7.70	0712	0728	0:16				0730	0743	0:13			
	Too Many Breaks									0744	0757	0:13			
*7269	Short Break	6:08	6.14	0908	0919	0:11									
	Too Few Meals														
	Too Few Breaks														

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*8585	Short Break	8:09	7.62	1535	1552	0:17	1804	1834	0:30	1959	2009	0:10			
*9077	Long Meal	9:52	7.75	0909	0927	0:18	1157	1400	2:03	1614	1630	0:16			
*1918	Break Too Early Short Break	7:42	7.17	0135	0151	0:16	0715	0746	0:31	0748	0758	0:10			
*2845	Short Break	4:43	4.72	2028	2039	0:11									
*8710	Short Shift Meal Too Early Short Break Long Meal Too Many Meals	4:11	3.69	2036	2047	0:11	1742	1812	0:30						
*4683	Short Break	8:12	7.72	1845	1900	0:15	1619	1648	0:29	1914	1915	0:01			
*8921	Long Shift	8:48	8.25	0632	0648	0:16	0917	0949	0:32	1130	1144	0:14			
*3639	Long Break Too Few Meals	6:52	6.75	1313	1325	0:12				1520	1542	0:22			

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*2222	Long Shift	9:21	8.77	1006	1024	0:18	1251	1320	0:29	1446	1504	0:18			
*4401	Long Break Long Break Long Meal	8:20	7.55	0909	0928	0:19	1107	1143	0:43	1330	1352	0:22			
*6676	Too Few Meals Too Few Breaks	6:49	6.82	1006	1018	0:12									
*1422	Too Few Breaks	7:30	7.05	0910	0926	0:16	1258	1324	0:26						
*9430	Break Too Early	8:10	7.55	0725	0743	0:18	1133	1205	0:32	0909	0926	0:17			
*5272	Too Few Meals Too Few Breaks	6:01	6.02	1307	1322	0:15									
*0334	Short Shift	2:33	2.55												
*4954	Long Break Too Few Meals Too Many Breaks	8:08	7.75	1119	1135	0:26				1322 1536	1345 1551	0:23 0:15			

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*1521	Short Shift	0:34	0.57												
*4041	Short Break	7:15	6.74	1337	1354	0:17	1509	1538	0:29	1638	1649	0:11			
*6121	Long Break	8:07	7.52	1513	1532	0:19	1658	1730	0:32	2014	2029	0:15			
*7311	Short Break	4:22	4.37	1936	1945	0:10									
*3211	Short Break Long Meal Too Few Break Too Many Meals	8:03	6.89	1333	1336	0:03	1129	1202	0:33				1405	1442	0:37
*2587	Long Break Long Meal	8:17	7.42	0909	0928	0:19	1120	1205	0:45	1337	1355	0:18			
*1321	Short Shift	3:50	3.84	1924	1939	0:15									
*7792	Too Few Breaks	8:07	7.65	0935	0950	0:15	1133	1201	0:28						
*0760	Long Meal Too Many Meals	8:26	6.65	1414	1432	0:18	1628	1659	0:31	1758	1810	0:12	1937	2050	1:13

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*5465	Long Shift Short Break	9:34	9.00	1303	1317	0:14	1227	1301	0:34	1630	1639	0:09			
*3415	Break Too Early	8:06	7.54	0726	0742	0:16	1133	1204	0:31	0909	0926	0:17			
*0209	Short Shift	3:45	3.75	1608	1623	0:15									
*7711	Long Break Long Meal	7:23	6.65	1334	1352	0:18	1533	1609	0:36	1734	1754	0:20			
*9297	Short Break	8:29	7.95	0908	0921	0:13	1330	1442	0:32	1505	1515	0:10			
*4632	Long Shift	9:11	8.69	0725	0741	0:16	1133	1201	0:28	0909	0925	0:16			
*7444	Long Break	5:01	4.94	1921	1941	0:20									
*3936	Long Break Too Few Meals Too Many Breaks	8:01	7.67	0941	0954	0:13				1213 1355	1238 1408	0:25 0:13			

*Time worked is amount of time the associate was in the store (including all breaks and meals) and is shown in hours and minutes.

Net hours is the amount of hours the associate is paid for the shift (and paid breaks and meals included) and is shown in hours and hundredths of an hour.

PORT LEGEND:

Following are the rules that determine whether an associate will appear on a Timeclock Punch Exception Report.

The following rules apply to MINORS

* TOO LATE DAY => Minor has worked too late
* TOO EARLY DAY => Minor started work too early
* SCHOOL HOURS => Minor has worked during school hours
* MAX W/O MEAL => Minor has maximum net hours without meal
* MAX HR/DAY => Minor has more than the maximum net hours allowed in a day
* MAX HR/WEEK => Minor has more than the maximum net hours allowed in a week
* CONSEC DAYS => Minor has worked more than the maximum number of straight consecutive days allowed

The following rules apply to all hourly associates

* NO MAIN OUT => associate has no main out punch for the day
* BREAK TOO EARLY => associate has worked less than 1 hrs 30 mins before first break
* MEAL TOO SHORT => associate worked less than 2 hrs before first meal
* SHORT SHIFT => associate net hours less than 4 hrs.
* LONG SHIFT => associate net hours more than 8 hrs.

The number and duration of breaks and meals depends on the amout of time worked
(To get the expected number and duration of breaks and meals, see Break/Meal Duration Rules below)

* SHORT BREAK => duration of break is shorter than expected break duration
* LONG BREAK => duration of break taken is longer than expected break duration
* SHORT MEAL => duration of meals is shorter than exepected meal duration
* LONG MEAL => duration of meal taken is greater than expected meal duration
* TOO MANY BREAKS => number of breaks taken is greater than expected number of breaks
* TOO MANY MEALS => number of meals taken is greater than expected number of meals
* TOO FEW BREAKS => number of breaks taken is less than expected number of breaks
* TOO FEW MEALS => number of meals taken is less than expected number of meals

Break/Meal Duration Rules:

Day of Week	Time Worked	Break Quantity	Break Duration	Meal Quantity	Meal Duration
	0:00	0	0:00	0	0:0(
All Days	3:01	1	0:15	0	0:0(
	6:01	2	0:15	1	0:3(

NOTE: -Net hours is shown in hours and hundredths of an hour
-All other figures are in hours and minutes
-Grace period for breaks is plus or minus 3 minutes
-Grace period for meals is plus or minus 5 minutes

END OF JOB

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained, or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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INTEREST OF THE *AMICUS CURIAE*[1]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Class and collective actions may be "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979), but they are no exception to the bedrock requirement of constitutional due process that a defendant have an opportunity to raise challenges and defenses to indi-

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

vidual claims. Lower courts, including the court below, have lost sight of that principle in sanctioning "trial by formula" cases, where liability and damages for individual class members are statistically extrapolated, rather than proven. The Court correctly rejected the use of that device in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), but further guidance is necessary to make clear that *Dukes* cannot be circumvented by more elaborate formulas or the presence of Fair Labor Standards Act wage and hour claims.

Rule 23's commonality and predominance requirements must be interpreted and applied consistent with the Rules Enabling Act and the Due Process Clause. Trial by formula where injuries are in fact individualized violates both. As to the Rules Enabling Act, formula-based class certification unlawfully alters the substantive rights of the parties, relieving individual class members of their burden to prove injuries and damages, while depriving defendants of the ability to challenge class members' showings and present individualized defenses. And that deprivation, in turn, violates defendants' due process rights. A formula cannot substitute for individualized evidence of liability, injury, or damages, except for when those questions truly are common—that is, when answering them for the class also answers them for individual class members in the same "one stroke." *Dukes*, 131 S. Ct. at 2551.

No less than Rule 23 class actions, collective actions under the Fair Labor Standards Act also must

comply with the basic tenets of due process. This court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is not an exception to that rule, although lower courts have incorrectly taken it to be one. *Mt. Clemens*, a wage and hour action, involved the very kind of strict commonality that is absent in typical trial-by-formula cases and holds only that, where employees are in fact identically situated, individual damages calculations may properly rely on "just and reasonable inference." *Id.* at 687. That holding, however, provides no license for unbounded "extrapolation" of damages for individual claims that vary widely in their particulars. Indeed, due process principles forbid such formulaic treatment of liability and damages. And those same principles are reflected in Congress's amendment of the FLSA in the wake of *Mt. Clemens* to emphasize the individual character of claims and employers' procedural rights.

Finally, the defendant in this case, Tyson, is the proper party to raise all of these issues, including the problems inherent in certification and maintenance of a class that contains members who were not injured and are not entitled to damages. Tyson's interest is plain, given that prevailing on either of the questions presented in this case would result in decertification of the class or judgment in its favor. In addition, the presence of uninjured class members implicates questions of judicial power under Article III of the Constitution that this Court is obligated to address. An unfair allocation of the award among

class members could also injure Tyson's interest in the *res judicata* effect of the judgment against it. If defendants like Tyson are precluded from challenging abuses of the aggregate litigation mechanisms, then the same collective-action problems that justify class procedures will likely prevent anyone from doing so, to the ultimate detriment of individuals who have actually been injured.

In sum, the logic of the decision below chafes against the requirements of Rule 23, the Rules Enabling Act, the FLSA, and constitutional due process. It should be reversed.

ARGUMENT

I. "Trial By Formula" Offends Rule 23, the Rules Enabling Act, and Constitutional Due Process

Commonality and predominance are not just Rule 23 prerequisites to class certification, but also essential to ensuring that class-action litigation does not alter parties' substantive rights, in violation of the Rules Enabling Act, or infringe the defendant's right to raise individual challenges and defenses to claims, in violation of the Due Process Clause. These requirements demand that determination of a class's "common contention" must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Trial by formula, as the court below sanctioned, cannot paper over the failure of common issues of fact and law to truly predominate,

such as in wage and hour lawsuits where individual fact issues are central to assigning liability and damages.

To begin with, the Rules Enabling Act could not be clearer that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rules must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941). The governing test is therefore "what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). The *sine qua non* of a permissible procedural rule is that, while it may regulate "the process for enforcing [the parties'] rights," it does not "alter[] the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *Id.* at 407–08 (surveying cases).

"Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."

Dukes, 131 S. Ct. at 2561 (citations omitted). As *Dukes* recognized, Rule 23's commonality and predominance requirements carry out that command, by joining together only what is truly common among class members, so that the rights of neither class members nor defendants are altered when those common issues are adjudicated class-wide. *Id.* In that way, the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It is an appropriately "demanding" standard, *id.* at 624, one that the Rule's drafters anticipated would *not* be met in cases presenting "significant questions, not only of damages but of liability and defenses of liability,...affecting the individuals in different ways." *Id.* at 625 (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

After years of inconsistent practice in this area, the Court's recent decisions in *Dukes* and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), signaled a retreat from the "seduction of procedural efficiency" that has beset lower court treatment of class actions. *See* Saby Ghoshray, Hijacked by Statistics, Rescued by *Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation, 44 Loy. U. Chi. L.J. 467, 469 (2012).

In *Dukes*, the Court explained that plaintiffs cannot simply raise common *questions* to meet Rule 23's commonality requirement; they must demonstrate that *answers* to those questions are such that their

resolution will apply equally to the claims of all class members. 131 S. Ct. at 2551. On that basis, *Dukes* rejected a district court's "novel" plan to conduct a "Trial by Formula" wherein liability and damages would be determined for a "sample set of the class members" and then extrapolated out to the "entire remaining class," relying on multiplication "to arrive at the entire class recovery—without further individualized proceedings." *Id.* at 2561. That approach, the Court concluded, violated the Rules Enabling Act because it precluded Wal-Mart from "litigat[ing] its statutory defenses to individual claims" and thereby impermissibly abridged its rights. *Id.*

Comcast similarly held that class damages methodologies must be tied to the plaintiffs' liability theory and requires that "courts...conduct a 'rigorous analysis' to determine whether that is so." 133 S. Ct. at 1433 (quoting *Dukes*, 131 S. Ct. at 2551–52). *Comcast* makes clear that the potential efficiency of class-wide adjudication cannot justify certification of a class action premised on imprecise, unreliable, and amalgamated damages models. Taken together with *Dukes*, *Comcast* "instructs courts that the method by which...damages are calculated may not serve as an afterthought in the class certification analysis, as whenever damages calculations require significant degrees of individualized proof, defendants are entitled to respond to and address such variances—in

fact, due process requires it." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 592 (S.D.N.Y. 2013).[2]

Dukes and *Comcast* illustrate how perfunctory application of Rule 23's commonality and predominance requirements can run afoul of the Rules Enabling Act by altering the parties' substantive rights. With loosened commonality and predominance standards, individual class members could "prove" claims without satisfying the statutory criteria—for example, as here, by substituting expert testimony concerning the "average" time other employees in different jobs spent donning and doffing gear for any evidence of the amount of time they actually spent at those tasks. Likewise, defendants would be deprived of their statutory right to be held liable only for violations of statutory obligations and their right to challenge individual claims and present individual-

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[2] Some lower courts have improperly confined *Comcast's* holding to the antitrust context. *E.g.*, *Neale v. Volvo Cars of N. Am., LLC*, No. 14-1540, 2015 WL 4466919, at *16 (3d Cir. July 22, 2015) ("A close reading of [*Comcast*] makes it clear that the predominance analysis was specific to the antitrust claim at issue."); *Ramirez v. Riverbay Corp.*, 39 F. Supp. 3d 354, 369 (S.D.N.Y. 2014) ("The relevance of the holding in *Comcast* outside the antitrust context is not yet clear[.]"). *See also Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (2013) (noting that courts "have grappled with the scope, effect, and application of Comcast' s holding, and in particular, its interaction with non-antitrust class actions"). This case presents an appropriate vehicle to clarify that *Comcast's* scope is not so limited and to affirm the heightened standard against which class damages models must be measured.

ized defenses. This is why a formula cannot be a substitute for individualized evidence of liability, injury, or damages, except for when those questions truly are common—that is, when answering them for the class also answers them for individual members in the same "one stroke." *Dukes*, 131 S. Ct. at 2551. The Rules Enabling Act requires no less.

So does constitutional due process. "Due process requires that there be an opportunity to present every available defense." *Am. Sur. Co. v. Baldwin*, 287 U. S. 156, 168 (1932). Thus, "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008)). *See also Duran v. U.S. Bank Nat. Ass'n*, 325 P.3d 916, 935–36 (Cal. 2014) (affirming reversal of judgment for class plaintiffs in a wage and hour action where trial court's use of statistical sampling to establish class-wide liability deprived defendants of the ability to litigate individual defenses in violation of due process). When aggregate litigation procedures procedures abridge a defendant's ability to mount the same defenses that it could bring in individual suits, something is seriously wrong.

Yet due process concerns have sometimes received short shrift from lower courts overseeing class actions that use formulas or other non-individualized

sources of "proof" to evade individualized inquiry. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 774–87 (9th Cir. 1996) (affirming award of compensatory damages based on a statistical sample of class claims that was extrapolated to estimate the percentage of valid claims class-wide); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (reversing denial of certification premised on calculations based on payroll records); *Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 595 (D. Or. 2013) (certifying claims based on aggregate figures).

The Court should be aware that these problems also arise in cases in which commonality and predominance run aground on legal, rather than factual, shoals. *In re Rhone-Poulenc Rorer, Inc.*, for example, involved a district court's plan to consolidate over 300 hemophilia-related suits against drug companies into a single class action to be tried under a jury instruction that purported to "merg[e]" the negligence standards of all 50 states. 51 F.3d 1293, 1300 (1995). The Seventh Circuit rejected that gambit, finding that the alteration of substantive rights through what it called an "Esperanto instruction" "exceed[ed] the permissible bounds of discretion in the management of federal litigation[.]" *Id.* at 1297. Although aggressive, the district court's approach was not at all novel—similar approaches had been advocated in other cases, with inconsistent result. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 93 (D. Mass. 2008) (rejecting class plaintiffs' proposal to substitute generic fraud instruction

for over 30 separate state unfair and deceptive trade practice acts); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423–24 (E.D. La. 1997) (denying certification in products liability action premised on violations of multiple state laws, noting that "composite instructions accounting for all of these differences would hazard a chaos that seems counterintuitive to the spirit of Rule 23"); *Tylka v. Gerber Products Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998) (differing standards of proof, procedure, substance, and remedies in 50 state consumer fraud statutes overwhelmed common issues, precluding certification of a nationwide class).

While not unique in forgoing a rigorous predominance analysis, the decision below condoned a particularly egregious instance of trial by formula. Rather than require strict commonality and predominance, the Eighth Circuit upheld certification of a class consisting of employees whose individual circumstances differed substantially, such that classwide proof of liability and damages could not possibly reach the same results as individual trials. Pet. App. 1a–24a. Rather than require each plaintiff to prove liability and damages on an individual basis, it allowed extrapolation from averages based on an unrepresentative sample of employees. *See* Pet. Br. 8–9 (citing filings). It was not deterred by the presence of uninjured parties in the plaintiff class or by the lack of discernable means to separate them from those actually entitled to damages. Pet. App. 8a–10a. As a result of these and other shortcuts, the defendant

was precluded from challenging individual liability and damages claims, as well as from presenting individualized defenses.

None of this can be squared with Rule 23, the Rules Enabling Act, or the Due Process Clause. The Court should make clear that it meant what it said in *Dukes* and *Comcast* and that interests of convenience and efficiency, or even a court's view of what constitutes rough justice, are unequal to the fundamental rule-of-law and due process concerns that mandate strict adherence to Rule 23's commonality and predominance requirements.

II. Due Process Requirements Also Forbid Trial by Formula in FLSA Collective Actions

In *Dukes*, this Court erected an absolute bar against trial by formula that deprives a defendant of its right to defend against individual claims in aggregate litigation. 131 S. Ct. at 2561. Nevertheless, the type of trial by formula that *Dukes* vanquished remains alive and well in a thriving corner of aggregate litigation—wage and hour collective actions brought under the Fair Labor Standards Act in conjunction with Rule 23 class actions. In those cases, *Dukes'* guidance has been inappropriately relegated to secondary status.

The court below, like many others, relied on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), to support the use of averages or other aggregate figures to determine employer liability under the FLSA. This reliance on *Mt. Clemens* is wholly

misplaced, given what the case actually says. As with Rule 23 class actions, FLSA collective actions must adhere to basic tenets of due process.

A. *Mt. Clemens* Does Not Authorize Trial by Formula

In *Mt. Clemens*, a group of pottery employees sued their employer alleging that they were deprived of compensation for the time they spent walking to their workstations and preparing for work. 328 U.S. at 684. The Court held such time to be compensable for all employees. Because it was undisputed that the employer did not provide compensation for those activities, the Court could "assum[e] that the employee has proved that he has performed work and has not been paid in accordance with the statute." *Id.* at 688. In other words, there was no question that all of the employees had been injured in the same fashion.

The only uncertainty in *Mt. Clemens* was "in the amount of damages arising from the statutory violation by the employer" based on the class-wide liability that had already been proven. *Id.* The Court resolved that problem by reasoning that, in the event liability is evident but the employer's records are inadequate to precisely calculate damages, an employee may "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 677. In particular, the employees' evidence, although aggregate in certain respects, showed that they were all required to perform the same preliminary and postliminary ac-

tivities, in the same period of time, for which they were not compensated. *See id.* at 690, 693–94 (discussing employees' evidence). Thus, *Mt. Clemens* stands only for the modest principle that, when liability has been shown and the employer's records are inadequate, identically situated employees may prove damages on a class-wide basis. Because the employees are identically situated, this is, in effect, identical to the *Dukes* "one stroke" standard. *See* 131 S. Ct. at 2551.

Yet many lower courts, including the court below, have relied on *Mt. Clemens's* "just and reasonable inference" language in recent cases to establish Section 16(b) class-wide liability and extrapolate damages.[3] Pet. App. 8a. In so doing, they bypass due process requirements when FLSA claims are involved, finding that *Mt. Clemens* permits employees to use an average-hours-worked metric to certify a class. That reasoning not only is contrary to *Mt. Clemens* itself, but to the due process requirements codified in collective action law after *Mt. Clemens*.

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[3] Based on Westlaw citation counts, of the 901 federal district and appeals court citations to the "just and reasonable inference" language of *Mt. Clemens*, 597 have occurred since 2005. By contrast, in the 10-year period immediately following *Mt. Clemens*, the "just and reasonable inference" language was cited 18 times. *See, e.g., Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 637 (2d Cir. 1946) (citing *Mt. Clemens* to hold "[w]here the fact of damages is certain, the uncertainty of the amount will not prevent their being assessed").

Consider, for instance, the facts of the case below. "During a nine-day trial, plaintiffs proved liability and damages by using individual timesheets, along with average donning, doffing, and walking times calculated from 744 employee observations." Pet. App. 5a. The jury verdict provided a single gross distribution to "the class," the combined FLSA opt-ins and Rule 23 class members who sued under Iowa's state labor law. Pet. App. 1a. That verdict was $2,892,378.70, less than half the plaintiffs' "all or nothing" calculation of class-wide damages based on average donning and doffing times and individual wage records. Pet. App. 6a, 125a. The reduction ensured that hundreds of the class members who received compensation were in fact not injured according to the jury's verdict. Pet. App. 125a. (Beam, J., dissenting from order denying petition for rehearing *en banc*).

The Eighth Circuit permitted this type of "averaging" to establish liability on an individual basis because it misread *Mt. Clemens*: "For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated workers." Pet. App. 11a. That interpretation of *Mt. Clemens* is incorrect and undermines employers' due process rights to assert statutory defenses to individual claims. Application of *Mt. Clemens* to adjudicate class liability has led to the point where the Eighth Circuit—in complete contrast to the teaching of *Dukes*—relied on statistical sampling to assign not just damages, but liability, to a com-

bined Rule 23 and Section 16(b) class comprised of employees with very different circumstances.[4] Pet. App. 13a–14a. *Mt. Clemens*, however, could reasonably assume liability for all workers based on the employer's failure to pay for their identical preliminary and postliminary activities, and only then did it allow a "just and reasonable inference" regarding damages. The fact and nature of damage were certain across the board. 328 U.S. at 687. And even then, it remanded the case "for the determination of the amount of walking time involved and the amount of preliminary activities performed," *id.* at 694, instructing that each employee must "prove[] that he has in fact performed work for which he was improperly compensated" and "produces sufficient evidence

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[4] This approach to combined litigation is what the dissent referred to as "homogenizing" the Rule 23 and FLSA procedures for trial. Pet. App. 14a. Here the melding of procedures followed the dictates of neither the FLSA nor Rule 23 and produced a pot of money that could not legitimately be distributed to the composite groups of employees. Indeed, the homogenization only worsened the constitutional deprivations. The jury awarded a lump sum verdict and provided no mechanism to allocate the judgment. This also raises significant Seventh Amendment issues relating to the determination of damages. Indeed, with respect to legal relief, there is a "Seventh Amendment right[] to have a jury determine[] the distinct and separable issues of the actual damages of each of the [absent] plaintiffs." *Cimino v. Raymark Indus.*, 151 F.3d 297, 321 (5th Cir. 1998).

to show the amount and extent of that work," *id.* at 688.[5]

Mt. Clemens was quite unlike the situation here, where it is certain that some employees were not injured at all. Pet. App. 121a ("[W]ell over half of the putative class employees in this case have not 'shown work performed for which [they were] not compensated.'") (Beam, J., dissenting from order denying petition for rehearing *en banc*) (quoting *Holaway v. Stratasys*, 771 F.3d 1057, 1059 (8th Cir. 2014)). Thus, under the guise of dispensing damages, the lower court here assigned liability where there was none, awarded damages where there were none, and did so relying on "evidence" that says nothing about individual workers' actual entitlements to relief. Whether any individual employee actually performed uncompensated work in this case requires individual analysis, which makes the Eighth Circuit's reliance on *Mt. Clemens* to permit the jury to statistically assign liability in the first instance and to extrapolate damages improper.[6]

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[5] As the Sixth Circuit recognized: "*Mt. Clemens Pottery* and its progeny do not lessen the standard for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d. 567, 602 (6th Cir. 2009).

[6] Not only that, but as Judge Beam further pointed out, unlike *Mt. Clemens*, the employer here maintained "adequate attendance, assignment, equipment, work time and pay roll records" that "were available to each Tyson employee." Pet. App. 121a.

Properly understood, the approach taken in *Mt. Clemens*—finding class-wide liability before applying an inference to individual damages for identically situated employees—dovetails with the due process considerations articulated by this Court's contemporary class-action jurisprudence. An employer's due process rights are denied when liability is determined by statistical sampling that relieves individual employees of the burden of proving liability and damages and blocks individualized defenses. *Mt. Clemens* should not be stretched beyond recognition to permit such blatant due process violations.

B. Post-*Mt. Clemens* Amendments to the FLSA Confirm the Centrality of Due Process Rights

Section 16(b) of the FLSA authorizes an employee to bring suit on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). Section 16(b) actions, though, are neither class nor true representative actions. Congress amended Section 16(b) in 1947 in response to a wave of wage and hour representative litigation in the manufacturing sector.[7] Portal-to-

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Thus, whatever basis might exist to grant a just and reasonable inference for employees to rely on statistical sampling to establish damages is beside the point when the employer does supply adequate records.

[7] In *Mt. Clemens*, this Court construed the term "workweek" in the FLSA to "include[] the time employees spent walking from time clocks near a factory entrance to their workstations." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 21 (2005) (citing *Mt. Clemens*, 328 U.S. at 691–692). The Portal to Portal Act amendments were in

Portal Act of 1947, ch.52, § 5, 61 Stat. 84, 87–88 (1947) (codified at 29 U.S.C. § 216(b)). With those amendments, "the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (citing 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell)).

Senator Donnell, then Chairman of the Senate Judiciary Committee, articulated the rationale for the provision: "[I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit." *See Arrington v. Nat'l Broad. Co., Inc.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 Cong. Rec. 2182 (1947)). *See also Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984) ("The opt-in language of § 216(b) was a direct result of this clear congressional dissatisfaction with

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part a response to *Mt. Clemens'* merits holding based on a Congressional view that the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities.' *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 63 (1953).

the original class action provisions of the FLSA."); *United States v. Cook*, 795 F.2d 987, 993 (Fed. Cir. 1986) ("In the absence of any legislative history to the contrary, we find those remarks of Senator Donnell [about the problems with the prior representative actions] persuasive.").

Substantively, the amendments had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims *in their own right* and freeing employers of the burden of representative actions." *Hoffman-La Roche Inc.*, 493 U.S. at 173 (emphasis added). Only those employees who affirmatively join the action and are deemed by the district court to be "similarly situated" within the meaning of Section 16(b) can receive monetary relief upon judgment. And only those employees who join are bound by the judgment. *Myers v. Hertz Corp.*, 624 F.3d 537, 542 (2d Cir. 2010) ("[P]laintiffs in FLSA representative actions must affirmatively 'opt in' to be part of the class and to be bound by any judgment."). This procedure maintains the employer's due process right to defend against individual employees' claims along with the due process rights of employees who wish to refrain from joining the lawsuit.[8]

In sum, the 1947 amendments to the FLSA reinforce defendants' due process rights and should not

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[8] The district court in a collective action has the discretion to determine the statutory meaning of "similarly situated" under the FLSA to decide whether the case can proceed collectively or on an individual basis.

be circumvented through devices that seek to move FLSA actions further from the employee-centric ideal that Congress intended.[9]

III. The Defendant Is a Proper Party To Challenge an Aggregate Damages Award that Compensates Uninjured Class Members

The Court should reject any argument by Respondents that a defendant cannot challenge certification or maintenance of a class that includes members who suffered no injury at all. *See* Pet. App. 130a–131a (Benton, J., respecting denial of rehear-

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[9] Despite the 1947 amendments, FLSA collective actions are among the most-filed types of contemporary aggregate litigation. Plaintiffs' attorneys pursue FLSA collective litigation because it is relatively easy and lucrative. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U.L. Rev. 515, 541 (2009) (noting that FLSA conditional certification results in settlement pressure because it "signals the potential expansion of the case and the need for significant and expensive class-wide discovery"); Allan G. King, Lisa A. Schreter, Carole F. Wilder, You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA, 5 Fed. Cts. L. Rev. 1, 10 (2011) ("Because conditional certification frequently subjects employers to 'mind-boggling' discovery, the costs and resources required to defend a case, even if only 'conditionally' certified, place enormous pressure on employers to settle prior to reaching the second, decertification step."). A Rule 23 class action may be added, as in this case, to broaden the relief available and expand potential employer liability because of the lack of a statutory opt-in requirement.

ing *en banc*). Particularly when formula-based aggregate damages are reduced in a *pro rata* fashion that calls into question the defendant's liability *vel non* to individual class members, the defendant is entitled to raise that issue so as to secure its own rights, enforce the limitations of Article III jurisdiction, and protect itself from the risk of future liability.

Whether or not defendants generally have a cognizable interest in the allocation of class-wide damages, *cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n.7 (1980), Tyson does here. The plaintiffs' proof of class-wide damages consisted of expert testimony that applied two "average" donning and doffing times of 18 and 21.25 minutes to Tyson's payroll records. J.A. 139, 410, 417–18. Those average times, in turn, were based on another expert's analysis of a few Tyson workers and reflect a wide range of actual times—for donning, ranging anywhere from 12 seconds to ten minutes. J.A. 142–43. As the damages expert conceded, even small reductions in the calculated averages results in large reductions in the number of class members who were (in plaintiffs' view) injured, as individual members' work hours fell below 40 for a given week or they were fully compensated by the amounts that Tyson had already paid. J.A. 424–25. Based on this methodology—in particular, using the averages calculated by the other expert—she testified that class-wide damages were $6,686,082.36 for the Rule 23 class. J.A. 139, 410, 417–18. The jury, however, apparently did not

buy the average times and awarded damages of $2,892,378.70, less than half what plaintiff sought. J.A. 467. Due to the nature of plaintiffs' proof of damages, this means that some number of class members could not have suffered any injury recognized by the jury verdict.

As an initial matter, this issue is adequately supported by Tyson's interest in decertification of the class or entry of judgment in its favor. Tyson moved the district court, at the close of plaintiffs' case, to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. J.A. 14 (Dkt. 270). That motion was denied, as was Tyson's renewed motion following the verdict. Pet. App. 30a (rejecting challenge because there was "not a complete absence of probative facts to support the conclusion, nor did a miscarriage of justice occur"). Because a decision for Tyson on this issue would undermine the judgment against it and could affect its ultimate liability, Tyson is a proper party to raise it.

That aside, Tyson may challenge the allocation of damages among class members for two additional reasons. First is to enforce the Constitution's case-or-controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Every "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations and quotation marks omitted). This applies equally to class

members, given that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 613. *See also Lewis v. Casey*, 518 U.S. 343, 357–58 (1996) (limiting relief in class action to that supported by standing). Indeed, "[t]his and every federal court has an independent obligation to consider standing, even when the parties do not call it into question." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1454 (2011). A federal court would be required to consider its power under Article III to award damages to an uninjured party regardless of whether the defendant or anyone else raised the issue.

The second reason is that Tyson "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). A defendant "has an interest in ensuring it pays only legitimate claims" because, to the extent illegitimate payouts reduce relief to injured class members, they "could argue the named plaintiff did not adequately represent them because he proceeded with the understanding that [injured] members may get less than full relief." *Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013). In that instance, the defendant's reliance on *res judicata* would be placed in jeopardy; after all, "[w]hen class members are not adequately represented by the named plaintiff, they are not bound by the judgment." *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 42 (1940)). *See also Pelt v. Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). Tyson may

face just that risk here, if employees with above-average donning and doffing times conclude they were undercompensated in favor of class members with no injury to speak of.

Finally, as a policy matter, it is at least troubling that class counsel here has "no basis for concern" about giving away a portion of the class award to uninjured class members at the expense of injured ones. BIO at 19. Someone ought to be concerned. And while Tyson's interests may be different from those of class members, its interest in securing appropriate compensation so as to take advantage of *res judicata* is aligned with that of injured class members, who stand to benefit from any additional compensation that would result from a fairer allocation of the class award. *See Carrera*, 727 F.3d at 310. By all indications, if Tyson does not raise this issue, no one will.

CONCLUSION

To enforce the requirements of constitutional due process in the aggregate action context, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,

PETITIONER,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, RETAIL LITIGATION CENTER, INC., AND THE NATIONAL FEDERATION OF INDEPENDENT SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in cases of national concern in the federal and state courts throughout the country. They support the petitioner in this case because they have a strong interest in ensuring that the lower courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The organizations joining this brief include:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of

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[1] Pursuant to Sup. Ct. R. 37.2(a), all parties have filed blanket consent letters with the clerk of court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively generate over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

Retail Litigation Center, Inc. ("RLC"). The RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC has filed *amicus*

briefs on behalf of the retail industry in several of the Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center). The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center is the nation's leading small business association, representing approximately 350,000 members across the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has emphasized on multiple occasions the rigorous analysis that is required before a trial court may certify a class under Rule 23 of the Federal Rules of Civil Procedure, including most recently in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Those precedents have direct bearing on the questions presented here. As this Court has repeatedly held, the procedural device of a class action cannot be used to adjudicate claims on a class-wide basis when class members are not similarly situated and individual issues predominate over common ones.

Unfortunately, certain lower courts in a growing number of cases have refused to comply with this Court's directions and continue to certify classes in cases that are not suitable for class treatment. This is one of those cases. In the proceedings below, the Eighth Circuit upheld the trial court's decision to certify a class of petitioner's employees seeking compensation for alleged unpaid overtime, even though the evidence suggests that more than half the members of the class did not work unpaid overtime and therefore suffered no injury. The Eighth Circuit also concluded that Rule 23 allows class liability to be adjudicated using a statistical sampling model that glossed over significant differences between class members by presuming that all class members worked the same amount of unpaid overtime as an "average" employee. With respect to both issues, the Eighth Circuit relied on the same types of arguments

and committed the same types of fallacies that this Court's decisions have squarely rejected. The lower court's certification decision violates this Court's precedents, is inconsistent with core constitutional principles, and ignores basic requirements of Rule 23. It should be reversed.

ARGUMENT

The district court failed to conduct the rigorous analysis that Rule 23 mandates and allowed the named plaintiffs to sue on behalf of a large number of uninjured class members. The district court then compounded its error by relying on improper statistical sampling evidence that eliminated petitioner's individualized defenses. These errors violated Rule 23's essential requirements, as well as the constitutional standing and due process principles against which Rule 23 should be construed.

I. The Class Action Device Cannot Be Used To Create Article III Standing.

1. The separation-of-powers principles that divide the federal government's authority between the legislative, executive, and judicial branches are deeply woven into the fabric of our Constitution. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992). One expression of those basic principles is the doctrine of standing. That doctrine is essential to "setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III," and to ensuring that any party seeking relief has a personal, particularized injury that a federal court has the power to redress. *Id.* at 560 (internal

quotation marks omitted); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Standing is built on a single basic idea—the idea of separation of powers."). As this Court has held, "[t]hose who do not possess [Article] III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982).

It is well established that part of the "irreducible constitutional minimum of standing" required under Article III is an "injury-in-fact—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61. It is equally well established that standing "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

The courts below dispensed with these essential constitutional requirements by allowing the named plaintiffs to sue on behalf of a class that includes a significant number of uninjured individuals. The courts concluded that as long as one member of the class has a plausible claim of injury, standing requirements are satisfied. *See* Pet. App. 8a–10a, 29a–30a. That approach to class certification—which would exercise judicial power to grant a "remedy" to a plaintiff with no injury—cannot be reconciled with the constraints of Article III.

2. Rule 23 does not—and cannot—eliminate the constitutional requirement that each and every litigant seeking relief from an Article III court must suffer a cognizable injury. Although Congress has the power to "expand standing to the full extent permitted" by Article III, *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979), it does *not* have the power to expand standing *beyond* Article III's limits. The "requirement of injury in fact is a hard floor that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). It is thus "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Gladstone*, 441 U.S. at 100 ("In no event may Congress abrogate the [Article] III minima: A plaintiff must always have suffered 'a distinct and palpable injury '") (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). And it follows *a fortiori* that standing requirements cannot be altered by a Rule of Civil Procedure.

Accordingly, as this Court has recognized, "Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997); *see also Ortiz v. Fibreboard*, 527 U.S. 815, 831 (1989) (same); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23's "procedural protections" are "grounded in due process"). Indeed, it is a cardinal principle of statutory interpretation that "where an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The need to avoid "serious constitutional problems" is doubly strong where a Rule of Civil Procedure is at issue. And where Congress does seek to push constitutional boundaries, it should be expected to express its intent clearly and unmistakably. *See* Br. for Retail Litigation Center, Inc. Supporting Petitioner, at 7–14, *Spokeo v. Robins*, No. 13-1339 (U.S. July 9, 2015); Br. of Chamber of Commerce of the United States of America, et. al. in Support of Petitioner, at 27, *Spokeo v. Robins*, No. 13-1339 (U.S. July 9, 2015). Fortunately, avoiding these problems is easy in the circumstances of this case. Prohibiting the certification of classes that include uninjured class members is not merely a fair reading of Rule 23, it is the only permissible one.

3. Exercising judicial power to adjudicate the claims of uninjured class members is antithetical to Rule 23's express terms. Under Rule 23(a), the named plaintiffs in any case must establish that the class claims present at least one "common question[]" that, if adjudicated on a class-wide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Moreover, Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614, imposes additional "procedural safeguards," including the requirement that courts take a "close look" to ensure that common

issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432. That "demanding" requirement, works in tandem with the general commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623–24.

The requisite cohesion exists when all class members "possess the same interest and *suffer the same injury*." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added) (internal quotation marks omitted); *see also Wal-Mart*, 131 S. Ct. at 2551 ("[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The need to prove predominance by establishing a common, class-wide injury protects both defendants and class members by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21; *see also Comcast*, 133 S. Ct. at 1434 (plaintiff must offer "a theory of liability that is capable of classwide proof"). Moreover, because class members must suffer the same injury, it follows that for a class to be certified, each member also must satisfy the minimum requirements of Article III standing—that is, each class member must have suffered an injury in fact that is traceable to a defendant and likely to be redressed by a favorable decision. *See, e.g., Amchem*, 521 U.S. at 612–13. The named plaintiffs and absent class members cannot have suffered the "same" injury, as this Court's precedents dictate, if some class members suffered no injury at all.

For similar reasons, if significant numbers of class members are uninjured, the class cannot satisfy Rule 23's typicality requirement, which serves as a "guidepost[] for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 156; *Amchem*, 521 U.S. at 626 n.20 (noting that the due process adequacy-of-representation requirement tends to merge with the typicality and commonality requirements of Rule 23). When some class members have suffered no injury, there is a fundamental disconnect between their claims and the claims of the named plaintiffs. Under those circumstances, the class members' disparate liability claims are not sufficiently "interrelated" to meet Rule 23's typicality requirement.

4. The lower courts in this case failed to enforce Rule 23's essential requirements on the view that a more lenient approach to constitutional standing is justified in the class action context. But that view reverses this Court's teachings: "In an era of frequent litigation [and] class actions courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Aggregating claims of uninjured class members is inequitable because it prejudices the interests of class members who may have suffered actual injury, and also prejudices defendants' rights by expanding the class size and increasing pressures to settle.

In this case, for example, plaintiffs' expert acknowledged that there were 212 members of the

class who suffered no injury because they did not work any unpaid overtime even under the assumed calculated averages. *See* Pet. Br. 13. Moreover, as Judge Beam explained in his dissent, the jury awarded plaintiffs less than half the damages they requested, indicating that the jury discounted the average time spent donning, doffing, and washing protective equipment calculated by plaintiffs' experts, and that even more class members may have suffered no discernible harm. *See* Pet. App. 125a. Accordingly, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.* Allowing classes to be formed where more than half of the class members potentially suffered no injury-in-fact undoubtedly opens the door to abuse.

II. Statistical Averaging Cannot Be Used To Support Class Actions At The Expense Of Individualized Inquiries.

The lower courts also erred in certifying the class notwithstanding significant differences between the individual class members, finding that the differences were rendered immaterial under plaintiffs' statistical averaging approach. That type of statistical modeling, which arbitrarily assigns an average value to each class member, is contrary to basic principles of class action law as well as the due process principles against which Rule 23 should be interpreted.

1. Allowing a class to be formed where individualized liability issues substantially outweigh common questions runs directly counter to both *Comcast* and *Wal-Mart*. In *Comcast*, this Court

clarified that a plaintiff's damages evidence cannot operate to sweep away individualized defenses that a defendant may have to individual class members' claims. Aggregate damages models that determine the average impact to the average class member are therefore impermissible. Those types of models violate the Rules Enabling Act because they transform Rule 23's "procedural device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007); *see also* 28 U.S.C. § 2072.

Wal-Mart similarly emphasized that liability and damages determinations cannot be derived from formulaic statistical techniques that gloss over key factual elements and come at the expense of individualized proceedings. Rejecting a "Trial by Formula," this Court reversed class certification where "[a] sample set of the class members would be selected," and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561.

The statistical averaging approach endorsed by the lower courts here commits precisely the errors that *Comcast* and *Wal-Mart* warned against, replacing essential individual inquiries with a single computation reflecting the claims of a hypothetical "average" class member. That approach contravenes

this Court's direction that all class members must "possess the same interest and suffer the same injury." *E. Tex. Motor*, 431 U.S. at 403. In this case, for instance, the only way to determine whether an individual class member has a viable claim (or suffered any injury) is to separately determine whether the class member actually worked unpaid overtime. Among other things, that requires an individualized accounting of each employee's protective equipment and the time spent donning, doffing, and washing gear rather than a combined average assessment spanning over three thousand employees.

2. The record shows that there are substantial differences in the protective gear that employees wear based on their job responsibilities and their own individual choices. *See* Pet. Br. 4–5, 8–14, 30–31, 34. These differences lead to large variances in the amount of time that each employee spends donning, doffing, and washing equipment. *See, e.g.*, Pet. Br. 30–31 (noting that pre-shift donning of equipment in the locker room ranged from 0.583 minutes to 13.283 minutes, and that the post-shift range was 1.783 minutes to 9.267 minutes). There are also other material differences between employees. For example, some employees don their equipment on the production line, when they are already on the clock. *See* Pet. Br. 12. Some employees with setup or teardown responsibilities don or doff their equipment as part of activities for which they are already compensated. *See* Pet. Br. 10, 31. And some employees are not required to wash their equipment, which is instead washed by the plant. *See* Pet. Br. 31. These are all critical factual issues necessary to

assess the merits of each employee's claim for overtime compensation, yet the statistical averaging embraced by the decisions below swept them aside entirely.

The Eighth Circuit acknowledged that "individual plaintiffs varied in their donning and doffing routines," and that applying the statistical averaging approach to "individual overtime claims did require inference," but stated that such an inference was "allowable" under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Pet. App. 8a. That is wrong. *Anderson* did not hold that an inference as to liability may be drawn from a calculated average that has no direct correlation to the time spent working unpaid overtime by any individual employee. To the contrary, *Anderson* made clear that an employee seeking compensation for unpaid overtime carries his evidentiary burden only by proving that "he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

The Eighth Circuit's decision failed to require any proof of the first prong of this analysis; namely, whether each of the individual class members performed work for which they did not receive proper compensation. Simply assuming that individuals performed uncompensated work on the basis of a statistical averaging model—rather than assessing the actual amount of donning, doffing, and washing time spent by each employee and how much, if any, of this time was uncompensated—is an

impermissible "Trial by Formula." *Wal-Mart*, 131 S. Ct. at 2561; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

The Eighth Circuit also tried to distinguish *Wal-Mart* on the grounds that individual "employee time records [were used] to establish individual damages." Pet. App. 10a. But the mere fact that the court conducted an individualized inquiry as to *part* of the analysis does not cure the deficiencies with its threshold determination of class-wide liability based on a formulaic statistical calculation. Plaintiffs' statistical averaging produced an estimate for additional time that ignored the substantial differences in donning, doffing, and washing activities of individual employees and denied petitioner the ability to litigate "defenses to individual claims" at trial. *Wal-Mart*, 131 S. Ct. at 2561. Adding an incorrect, unfounded amount of additional time to individual timesheets does not correct that error.

3. As this case confirms, statistical analysis for purposes of litigation is an exercise fraught with peril, as it is often susceptible to manipulation and error. *See, e.g., Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (affirming denial of certification of class-wide discrimination claim where "statistical analyses were analytically flawed because they did not incorporate key relevant variables"); *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 939 (Cal. 2014) ("If statistical methods are ultimately incompatible

with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties."). These concerns are particularly acute in connection with class action claims.

Trying to determine an "average" that fairly and accurately represents the mean across an entire class can be an extraordinarily difficult task. Yet named plaintiffs in almost every class action case will not hesitate to proffer testimony from some expert representing that the claims of absent class members can be fairly adjudicated through the use of statistical averaging. Moreover, when statistical averaging serves as the foundation for class certification, it fundamentally modifies the nature of litigation. Allowing classes on the basis of statistical averaging makes certification (and liability) determinations rest primarily, if not, solely on the basis of expert testimony rather than the factual elements necessary to support a claim. This threatens to transform litigation into a dispute over statistical modeling rather than the facts and the law. Defendants in class actions will be limited to challenging the underlying methodology used by the experts rather than litigating the factual circumstances of each claim.

All of these concerns are illustrated by this case. The statistical average that plaintiffs' expert used was calculated based on the donning, doffing, and washing times of individual employees, but because individual inputs were inflated, the calculated average was also skewed. As acknowledged by

plaintiff's expert at trial, his methodology for measuring donning, doffing, and washing time included time that employees spent putting their gear on after they had already arrived at their work stations and were on the clock. Tr. 1003. The study also counted all "personal time," with the exception of going to the restroom, spent by employees that was interspersed with their donning, doffing, and washing activities. Tr. 1046. Among other things, this meant that numerous instances of employees taking a break from putting their gear on and socializing with one another were counted as recordable time, *see, e.g.*, Tr. 1083, 1086, 1102–03, as well as time that employees spent dancing as part of their pre-work routine, Tr. 1117. The inclusion of such activities demonstrates the ease with which statistical averages can be skewed and the risk that trial by formula class actions will necessarily require extensive litigation over the validity of statistical models.

4. In addition to ignoring this Court's Rule 23 precedents, allowing a statistical model to establish liability for an entire class runs a grave risk of violating due process. At a minimum, due process requires giving a defendant a meaningful opportunity to be heard and to present every available defense, including the defense that a particular plaintiff was, in fact, not injured. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). As a *theoretical* matter a court might allow a class action to proceed based on a statistical model that elides substantial variation among the class, but then allow the defendant the opportunity to show that

individual class members do not fit within the model. But as a *practical* matter, such an approach is entirely unworkable, especially in the context of large class actions. Holding hundreds or thousands of mini-trials regarding individualized issues would frustrate the entire purpose of certifying a class action—namely, to decide identical claims simultaneously and efficiently by deciding the claims of a *representative* plaintiff. Accordingly, the use of statistical models that ignore substantial variation within a class would, as a practical matter, deny defendants their right to defend against class members' different claims. That, in turn, would raise grave due process problems.

The California Supreme Court explained these important due process concerns in a case that in all relevant respects is virtually indistinguishable from this one. In *Duran v. U.S. Bank National Association*, the trial court attempted to adjudicate overtime claims of 260 bank employees by "extrapolat[ing] the average amount of overtime reported by [a 21-person] sample group to the class as a whole." 325 P.3d at 920, 935. The California Supreme Court unanimously rejected that approach as "profoundly flawed" because it "prevented [the defendant] from showing that some class members were exempt and entitled to no recovery." *Id.* at 920. As the Court explained, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.' *id.* at 935 (quoting *Wal-Mart*, 131 S. Ct. at 2561), and "[t]hese principles derive from both class action rules and principles of due process.' *id.* Just as in *Duran*, the lower courts' interpretation of Rule

23 here would raise serious due process concerns, which provide yet another reason to reject it.

III. Failing To Enforce Class Action Requirements Harms Businesses And Absent Class Members.

The issues in this case would not have been difficult to resolve if the Eighth Circuit had complied with this Court's earlier decisions. Those decisions were intended to ensure that the class action procedural device is used only in circumstances where common issues of fact and law among class members make it feasible and appropriate to have a single, unified litigation that preserves the fundamental rights and interests of all parties. Far too often, however, the lower courts continue to certify classes that fail to satisfy Rule 23, ignoring constitutional concerns and treating Rule 23 as a convenient expedient for dispensing rough justice.

All too often, sweeping, poorly formed 'class actions benefit only enterprising lawyers and their experts. Certifying loosely connected classes is not only unfair to class-action defendants, it risks binding absent class members to class-wide dispositions that are substantially divorced from the merits of their individual claims. Those interests are particularly acute in cases, such as this one, involving a concocted average class member that, by definition, will fail to adequately represent the claims of many class members and potentially dilute the recoveries of the truly injured.

In addition, by easing Rule 23's certification requirements, the lower court's approach will often

effectively predetermine a case's ultimate outcome. It is no secret that the path to recovery in many class actions is paved by convincing trial courts to prevent defendants from litigating individualized defenses, combined with the settlement pressures brought to bear by even small possibilities of large, aggregate liability. Class actions are thus a "powerful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act); *see also id.* (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling").

It is hard to overstate the toll that frivolous class actions take on U.S. businesses and ultimately their customers. Class actions can often drag on for years. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). And the costs of defending against them continue to rise, ranging at latest estimates from "$5 million to $100 million." Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* (FINPRO Focus July 2011), available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf; *see also* Carlton Fields Jorden Burt, LLP, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://

classactionsurvey.com/pdf/2015-class-action-survey.pdf ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case.").

Although the costs are high enough to hit the bottom line of even the largest company, meritless and overreaching class actions hit small business particularly hard "because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); *see also* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010), available at http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business tort liability costs); NFIB, *National Small Business Survey* vol. 5, issue 2 (2005) (noting that, on average, the cost of settling any legal dispute (let alone class actions) consumes 10% of a small business owner's salary); Matthew Grimsley, *What Effect Will* Wal-Mart *v.* Dukes *Have on Small Businesses*, 8 Ohio St. Entrepreneurial Bus. L.J. 99, 116–117 (2013) (discussing how small businesses, with fewer resources, are particularly ill-equipped to fight frivolous class actions). And, in addition to the direct costs of time and expense, there is the not-insignificant indirect cost to a business's reputation that comes with being embroiled in a class action. *See, e.g.*, Grimsley, 8 Ohio St. Entrepreneurial Bus. L.J. at 100 & n.7.

Given these factors, it is not surprising that, as this Court has repeatedly recognized, "[c]ertification of a large class may so increase [defendants'] potential damages liability and litigation costs that [they] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." 131 S. Ct. at 1752. In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

Class actions will probably always "present opportunities for abuse." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is particularly great in cases, like this one, where plaintiffs are allowed to inflate the class size by including individuals in the class who suffered no harm and rely on a flawed statistical averaging approach that brushes aside significant differences among class members.

* * *

The outcome in this case should not be in doubt: The Eighth Circuit's decision approving class certification should be reversed. The critical question is whether this Court will attempt to address the broader failure of certain lower courts to comply with Rule 23 and this Court's precedents. Because class action abuse remains a serious problem, *amici* respectfully ask the Court to take this opportunity to set out in clear terms the bright-line rules that should apply in this important area of the law. *First*, Rule 23 does not and cannot eviscerate constitutional standing requirements and, therefore, no class should be certified if it includes uninjured members. *Second*, statistical sampling must be applied with special care in the class action context and should never be used to resolve liability issues where there are significant differences between class members. *Third*, basic due process principles prohibit a class action from being structured such that a defendant may be held liable to an individual plaintiff without ever having an opportunity to present defenses specific to that plaintiff.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al., individually and on behalf of all other similarly situated individuals,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* CIVIL PROCEDURE PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write about civil procedure, class actions, and complex litigation, and are concerned about petitioner's arguments on (1) the use of statistical and other representative proof, (2) the Rules Enabling Act, and (3) due process. *Amici* respectfully seek to offer the Court their professional academic perspective on these particular issues.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in this case, employees in the Tyson Foods Storm Lake hog processing plant, do hard, dirty, dangerous work. To protect themselves and the hygiene of Tyson's pork products, plaintiffs wear personal protective equipment (PPE). All employees wear standard PPE, and most wear a variety of additional PPE, with the types worn overlapping substantially. During the time period at issue in this case, plaintiffs were all paid on Tyson's "gang time" system, which as a matter of uniform company policy did not compensate them for either the time they spent donning and doffing the standard PPE described above, or the time they spent walking to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] A full list of *amici* is provided in the appendix to this brief. *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

their work stations. The plaintiffs also alleged, and the jury found, systematic underpayment in connection with the additional knife-related PPE worn by nearly all workers.

Plaintiffs alleged Tyson failed to pay overtime owed under the Fair Labor Standards Act of 1938 (FLSA) and, by incorporation of the FLSA, the Iowa Wage Payment Collection Law, Iowa Code (IWPCL). The district court certified a Rule 23 class action after a careful and extended analysis of the required elements of Rule 23(a) and Rule 23(b). The court rejected plaintiffs' proposed class as overbroad and substituted a more narrowly drawn one for which common answers to common questions would or could resolve critical issues in an across-the-board manner. The court also rejected plaintiffs' suggestion that a Rule 23(b)(1) class action could be certified, in light of the individual money damage claims at issue. The court's decision to certify under Rule 23(b)(3) was consistent with subsequent dicta by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) ("we think it clear that individualized monetary claims belong in Rule 23(b)(3)").

After years of pre-trial wrangling, there was a class-wide trial at which plaintiffs presented multiple forms of evidence. They presented testimonial evidence as to Tyson's liability, from both representative plaintiffs and Tyson's own managers. They also presented exhibits and statistical evidence based on an industry-standard time study of worker behavior in the very Tyson plant where all class plaintiffs worked. And they presented individualized damage determinations computed from a combination of averages from the time study and millions of Tyson's own employee time-sheet records. Tyson vigorously defended itself at this trial.

A jury returned a verdict with specific answers to common questions, specifically finding Tyson liable for unlawfully failing to compensate plaintiffs under some of their allegations. The jury awarded damages that were both substantial and considerably less than what plaintiffs had requested.

Notably, Tyson declined to object under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to plaintiffs' time-study evidence, so it has conceded that this evidence was relevant and admissible. And Tyson has not sought review of the Eighth Circuit's affirmance of the district court's denial of Tyson's renewed motion for judgment as a matter of law, so Tyson has conceded that plaintiffs' evidence is legally sufficient to support a verdict.

Tyson now seeks a ruling from this Court that representative litigation using relevant, legally sufficient evidence violated not only Tyson's due process rights, but also the Rules Enabling Act (REA). Tyson also advances a radical theory of evidence that would destabilize many fields of law.

Tyson tells this Court (at 38) that the time-study evidence admitted in this case is "biased" and "unreliable," and (at 42) that it is "unrepresentative" and that "no reasonable inferences may be drawn from" it. Tyson also contends (at 36) that admission of this evidence violated its due process rights because it "lessened plaintiffs' burden of proof and undermined Tyson's ability to defend itself." Tyson argues that this same supposedly lessened burden of proof independently constitutes a Rules Enabling Act violation, because the burden of proof embodies a substantive right. *Id.*

Evidence that is biased, unreliable, and unrepresentative, from which no reasonable inferences may be drawn, and whose use violates both due process and the Rules Enabling Act is not admissible. Indeed, both *Daubert* and Federal Rule of Evidence 402 provide bases to object to the admissibility of such evidence. But Tyson did not object to the admission of the evidence in question.

This Court should reject all of Tyson's arguments. In light of Tyson's reliance in this Court on supposed deficiencies of evidence it failed so completely to challenge, the most reasonable disposition of this case would be to dismiss the writ as improvidently granted. Should the Court instead take up the merits of Tyson's arguments, it should reject them, and affirm the Eighth Circuit, for the following reasons addressed in more detail throughout this brief.

First, the Court should reject the evidentiary principle that Tyson claims as the basis for its REA and due process claims. Tyson states (at 19) that "[n]o court would allow an individual employee to prove that *he* worked unpaid overtime by submitting evidence of the amount of time worked by *other* employees who did different activities that took a different amount of time to perform." Tyson provides virtually no authority for the principle underlying this contention, and the empirical claim itself is demonstrably false: In FLSA actions alone, *many* courts have done precisely what Tyson says *no* court would do. Dispositive as it is, that is a side point to the threat posed by Tyson's new theory of evidence. Courts allow the kind of evidence Tyson disparages in many substantive fields of law, provided that such evidence meets the usual case-specific tests of

relevance and admissibility. In this context, those tests police not for the presence of any differences, but rather for *material* ones. Any endorsement of Tyson's position here would destabilize many areas of state and federal litigation. *See* Part I, *infra*.

Second, Tyson's Rules Enabling Act argument fails even to engage with Iowa substantive law or the federal law that it incorporates. The plain text of the FLSA, and many years of federal court practice based on it, establish that the FLSA embraces representative litigation, including both representative testimony and statistical evidence. Absent any indication to the contrary—and there is none—Iowa state law also should be understood to welcome such evidence in aggregate litigation. The litigation of plaintiffs' IWPCL claims using a Rule 23(b)(3) class action with representative evidence is thus entirely consistent with Iowa substantive law. Therefore, the trial conducted here did not violate 28 U.S.C. § 2072(b). *See* Part II, *infra*.

Third, even if Tyson has a due process interest of the sort it proclaims here, that interest was honored. As the record and Tyson's own merits brief together indicate, Tyson raised every one of its now-claimed defenses at trial. It is true that Tyson did not get to raise every one of these defenses via cross-examination of more than 3,000 class plaintiffs. But the fact that Tyson has a due process interest in raising defenses does not give it a trump card to do so in unlimited fashion. This Court has repeatedly held out the three-pronged test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), including when the most fundamental liberty interests are at stake, as the framework for determining the ambit of a procedural due process interest. If the Court takes

up Tyson's due process arguments, it should use the familiar *Mathews* framework. Applying *Mathews*, the Court can only find that the trial in this case easily satisfied Tyson's due process interests. *See* Part III, *infra*.[3]

ARGUMENT

I. THE APPROACH TO EVIDENCE IN THIS CASE HAS TRADITIONALLY BEEN USED IN FLSA CASES AND IS USED IN LITIGATION ACROSS WIDE SWATHS OF THE LAW

Tyson argues (at 36) that allowing plaintiffs to use statistical evidence in this case "masked important differences" across individuals, by allowing plaintiffs to focus on hypothetical rather than real plaintiffs.

As a threshold matter, this argument is inconsistent with Tyson's own practice in the ordinary course of business, in which it used precisely this type of average time study to pay—or not pay—workers for donning, doffing, and walking time. JA446-55. If Tyson could reasonably use average time-study data to determine its everyday compensation of Storm Lake workers, the same type

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[3] This brief addresses in detail only those issues related to the first Question Presented. Tyson's argument as to the second Question Presented should also be rejected, both because it mixes up merits and standing and because it arrogates to Tyson third-party standing to litigate interests of parties adverse to it. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (explaining that a party might have a "distinct and personal interest" as to the rights of absent class members due to the first party's interest "in seeing the entire plaintiff class bound by res judicata just as [the first party] is bound"). Respondents' merits brief addresses the second Question Presented in detail.

of data may reasonably be used to estimate donning, doffing, and walking time in litigation under the FLSA.

Further, Tyson's argument applies in equal measure to non-statistical evidence. Any use of evidence for representative purposes would in some sense "mask individual differences," Pet. Br. 33, and thereby "lessen" plaintiffs' burden of proof, *id.* at 36. But courts have many times allowed the representative use of testimony from a small share of plaintiffs in representative-action FLSA cases where, as here, class members are similarly situated as to basic job duties, gear, and company-wide compensation policies (*see* Part II.B, *infra*). The test is whether workers are *similarly* situated given all the facts and circumstances of the case, not whether they are *identical* in each and every respect.

Tyson also asserts that "[n]o court would allow an individual employee to meet his burden of proving that he performed work for which *he* was not properly compensated by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform." Pet. Br. 36 (internal quotation marks and citation omitted). But Tyson points to no text in the FLSA that would yield such an evidentiary rule, and the case law Tyson cites is as inapposite as it is meager.[4]

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[4] Tyson cites only a 12-year-old case from the Second Circuit, *Grochowski v. Phoenix Constr.*, 318 F.3d 80 (2d Cir. 2003), which affirmed a directed verdict because several non-testifying plaintiffs had failed to "point to *any* evidence establishing the amounts they *were* paid," *id.* at 88-89 (emphases added), and a recent district court case, *Callahan v. City of Chicago*, 78 F. Supp. 3d 791, 816 (N.D. Ill. 2015)

There is nothing unusual about an individual employee meeting *his* burden using evidence about *other* employees, even when this evidence includes some "differences." The relevant question is not whether there are any differences, but rather whether those differences are small enough that the proffered evidence meets Rule 401's requirement that evidence (a) "has any tendency to make a fact more or less probable than it would be without the evidence" and that this fact (b) "is of consequence in determining the action."

Rule 401 thus instructs that the pertinent question is whether evidence offered about the work done by a set of workers who testify or were included in Dr. Mericle's time study could make it "more or less probable" that Tyson unlawfully failed to compensate a plaintiff for her own work time. Here the answer is yes, because Tyson's failure to pay the workers for their donning, doffing, and walking activities was the result of a plant-wide policy; because all the workers in this case wore standard gear; because there was substantial overlap in the additional gear they wore; because all worked daily shifts in a plant that regularly ran for more than 40 hours a week; and because the jury was properly instructed on the use of representative proof. The time-study data buttressed plaintiffs' showing of a systematic pattern and practice of under-compensation at Storm Lake, a fact surely relevant to plaintiffs' claims. Moreover, the district court never had occasion to rule on the admissibility of the

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(granting summary judgment on grounds unrelated to the text Tyson quotes), *appeal pending*, No. 15-1318 (7th Cir.). The facts and legal issues in those two cases have nothing to do with this case.

evidence Tyson now disparages, because Tyson failed to challenge it when the time was ripe.

Unavoidably, no one will ever know the exact amount of time plaintiffs in this case worked without legally required compensation, because Tyson failed to keep proper time records. The best that employees can possibly do in this situation, as this Court recognized decades ago, is to provide evidence sufficient to create a "just and reasonable inference" of the damages owed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded on other grounds by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84. Under the FLSA, plaintiffs may meet this burden using representative evidence, including plant-wide data. *See* Part II.B, *infra*.

The Court should be mindful, moreover, of the broader implications of Tyson's uncabined attack on quantitative evidence. Tyson's evidentiary principle would prove a significant obstacle to the use of representative evidence in general, and statistical evidence in particular, whether by plaintiffs or defendants, and across numerous fields of law. The Federal Rules of Evidence, and the body of common law built up around them, are flatly inconsistent with such a result.[5]

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[5] Vast areas of litigation—involving both individual and class actions—would be radically changed if the Court were to question the use of statistical or other representative proof as a tool for establishing facts relevant to a particular individual case. The Federal Judicial Center's *Reference Manual on Scientific Evidence*, for example, has two chapters directly related to the use of statistics in litigation. The *Reference Guide on Statistics* opens with the observation that "[s]tatistical assessments are prominent in many kinds of legal cases, including antitrust, employment discrimination, toxic torts, and

Any time a material issue depends on a counterfactual object—what *would* have happened in the absence of the alleged wrongful activity?—there will be no way to determine facts at the center of litigation without using evidence based on *other* facts. Tyson's suggested evidentiary standard would transform the ability of litigants to use statistical evidence across many areas of the law; just a few such areas include damages determinations in wrongful death actions;[6] liability related to pharmaceutical products;[7] antitrust;[8] discrimination

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voting rights cases,' because "[s]tatistical studies suitably designed to address a material issue generally will be admissible." David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Federal Judicial Center, *Reference Manual on Scientific Evidence* 211, 213, 214 (3d ed. 2011) ("*Reference Manual*"). The *Reference Guide on Multiple Regression* notes that multiple regression analysis has been used in myriad cases involving antitrust, sex and race discrimination, voting rights, the deterrent effect of the death penalty, public utility regulation, and intellectual property. *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in Reference Manual* 303, 306-07.

[6] *See, e.g.*, *Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 402 (D.D.C. 2015) (finding it reasonable to base damages in a wrongful death action on experts' application of a forensic economic model to statistical earnings data); *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000) (holding that, under Mississippi law, there is a rebuttable presumption in favor of using *national averages* of earnings to calculate lost earnings in a wrongful death action).

[7] *See, e.g.*, *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997) (holding that plaintiffs may prove *liability* using epidemiological studies).

[8] *See, e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (reversing lower court as to certification not because an econometric model was *used*, but rather because the proposed model did not measure the right damages).

law;[9] and the use of DNA evidence in criminal prosecution.[10]

Tyson's proffered evidentiary limit would destabilize the myriad areas of law in which courts have long allowed statistical evidence. The proper test for whether such evidence is appropriate is not due process, unmoored from the facts of a case. Rather, it is the tried and true framework set forth by Rules 401 and 702. Evidence that tends to make a consequential fact more or less probable, and which meets the *Daubert* gatekeeping standards, should be admitted and tested through the "traditional and appropriate means of attack[]", namely, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. Material differences are a reasonable basis to reject evidence; the presence of *any* difference is not.[11]

Regardless of how it disposes of this case, this Court should make clear that nothing in its decision should be understood to undermine this framework.

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[9] *See Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (taking judicial notice of statistical methods for evaluating whether jury-selection method was discriminatory).

[10] *See United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994) (finding that district court did not abuse discretion by allowing statistical DNA evidence to be admitted).

[11] *See, e.g., Merck & Co. v. Garza*, 347 S.W.3d 256, 266 (Tex. 2011) (rejecting use of epidemiological study not because it involved other people, or even because those people took a different dosage of the drug at issue, or for a different amount of time, but rather because plaintiff took a *much* different dosage for a *much* different time).

II. THE RULES ENABLING ACT ALLOWS CLASS-ACTION LITIGATION WHERE SUCH LITIGATION IS CONSONANT WITH THE SUBSTANTIVE LAW, AS IT IS HERE

It is undisputed that the Rules Enabling Act prevents this Court from promulgating "general rules of practice and procedure," 28 U.S.C. § 2072(a), that change substantive rights, *id.* § 2072(b).

Tyson argues (at 36) that the district court's allowance of the statistical evidence discussed above "lessened plaintiffs' burden of proof," thereby impermissibly abridging Tyson's substantive rights. Intrinsic to this argument is Tyson's view that, to win, a plaintiff class must offer proof that would be sufficient to win in a set of separate, individual-specific trials for each plaintiff in the class. As the *Shady Grove* plurality put this idea:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (plurality).

But that way of understanding the REA question does not apply here, because the federal and state substantive law relevant to the present case have long permitted wage-and-hour plaintiffs to prove claims on a representative group basis. Decades of FLSA cases are in accord, starting most famously with this Court's decision in *Mt. Clemens*, which approved the use of representative testimony from

eight employees to establish an employer's group-wide liability under the FLSA to a group of 300 in total. For a number of district court cases from the 1940s allowing such representative testimony even before *Mt. Clemens*, *see* Albert B. Gerber & S. Harry Galfand, *Employees' Suits under the Fair Labor Standards Act*, 95 U. Pa. L. Rev. 505, 508-09 (1947) (collecting cases in which there were "'marked differences' in employment," and explaining that, according to practice at the time, there need only be "a peg upon which to hang the statutory language 'employees similarly situated' [for] the action [to] go forward") (footnotes omitted); *see also Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 371-72 (4th Cir. 2011) (approving use of average from expert's time study in the same way such average was used here); *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) (describing representative testimony and time-study evidence as competent evidence that can contribute to a "finding of class-wide liability").

Thus Tyson misapprehends the REA question. It is not whether the burden of proof was lessened as to particular individual plaintiffs' claims. As even Tyson's own proposed jury instructions reflected here, plaintiffs faced the usual burden of proof. The REA question here concerns the substance of what plaintiffs had to prove under Iowa law. In other words, the question concerns not the *burden* of proof, but rather what the *object* of proof is.

Plaintiffs did not need to provide individual-by-individual presentation of evidence to establish the elements of their claims, because long practice establishes that, under the FLSA's substantive provisions, claims of groups of plaintiffs may be

proved on a representative basis. The cases clearly establish that FLSA claims brought under 29 U.S.C. § 207 may be proved once, on a group-wide basis. While this practice has developed in actions brought under 29 U.S.C. § 216(b), the representative-action section of the FLSA, § 216(b)'s procedural terms could hardly make group-wide liability the object of proof if § 207 did not allow it.

That is critical for this case, because the IWPCL incorporates § 207's substantive terms. As a general rule, plaintiffs making IWPCL claims that spring from the FLSA may prove them the same way they would prove the underlying FLSA claims. Barring express reason to think otherwise—and a review of both the IWPCL's text and Iowa case law indicates that no such reason exists here—plaintiffs may prove their IWPCL claims the same way they would prove them directly under the FLSA. Thus, plaintiffs may prove their claims on a group-wide basis, using the same representative evidence they could use directly under the FLSA.

A. The Rules Enabling Act Requires Fidelity to the Substance of Both Federal and State Law

It is appropriate for this Court to promulgate, and for the lower courts to apply, "general rules of practice and procedure," 28 U.S.C. § 2072(a), so long as these rules do not change the substantive rights embodied in either congressional or state legislation, or state common law. The point of the second part of the Rules Enabling Act, 28 U.S.C. § 2072(b), was, and properly considered remains, the delineation of the boundaries of the judiciary's legitimate institutional authority. "Congress wanted the definition of substantive rights left to itself in cases

where federal law applies, or to the States where state substantive law governs." *Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 565 (1991) (Kennedy, J., dissenting).

It is impossible for the REA to pose an obstacle to the representative FLSA collective-action aspect of this case, both because Rule 23 plays no role under the direct FLSA claims and because the aggregate litigation of the FLSA claims in this case is blessed by the plain text of the procedural terms of the FLSA itself, *see* 29 U.S.C. § 216(b). The sole statutory requirement qualifying the characteristics of individuals who can be represented in aggregate litigation under § 216(b) is that they be "similarly situated."

But the FLSA's substantive terms nevertheless are relevant to REA considerations, because Iowa state law incorporates these terms. The IWPCL declares that "[a]n employer shall pay all wages due its employees." Iowa Code § 91A.3. Because § 207 of the FLSA creates obligations to pay wages, it can be the source of an employer's obligation to pay wages "due its employees" under the IWPCL. That is the basis—and the only basis—of plaintiffs' claims under the IWPCL in this action. For workers in the Iowa Rule 23 class, then, the IWPCL claims are established if and only if those workers' FLSA claims under § 207 are established. Accordingly, substantive rights under § 207 of the FLSA also are directly grounded in Iowa state law.

B. FLSA Litigation Has Long Proceeded on a Group-Wide Basis

The substantive policy of allowing a group of FLSA plaintiffs to satisfy their burden of persuasion

through representative proof is exhibited in the development of case law over nearly seven decades. This long experience evinces a clear stance in favor of aggregate litigation in which plaintiffs need not introduce evidence individual-by-individual. Consequently, representative evidence—whether testimonial, statistical, or otherwise—is appropriate in aggregate actions brought under § 207.[12]

Courts adjudicating FLSA claims in representative actions have long permitted evidence from a small fraction of plaintiffs in favor of the aggregation of those represented. For example, *Mt. Clemens*, which pre-dated Rule 23's expansion in 1966, involved the testimony of just eight workers out of the 300 represented. *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 462 (6th Cir. 1945). This allowance for some workers to testify for the benefit of all represented plaintiffs has continued with regularity, *see Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (allowing representative testimony of 39 employees to support an award of back wages for approximately

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[12] Despite the exclusive focus Tyson trains on plaintiffs' use of time-study averages, Tyson's argument would apply no less to the voluminous testimonial evidence provided by representative plaintiffs and Tyson managers, which Tyson has ignored in briefing this Court. The testimonial evidence is of a piece with the statistical evidence, because both tend to establish that Tyson unlawfully failed to compensate its workers for their work time. If the time-study averages "lessened plaintiffs' burden of proof," as Tyson maintains, then all the testimonial evidence did, too. There is no principled way for this Court to find statistical evidence bad under the Rules Enabling Act, but representative testimonial evidence good. If anything, presenting both testimonial and empirical evidence is *more* rigorous and reliable than relying on testimony alone, so this practice should not be discouraged as a general rule.

1,500 employees in total); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472-73 (11th Cir. 1982) (23 testifying employees sufficient for back wages award to 207); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973); *McLaughlin v. DialAmerica Mktg., Inc.*, 716 F. Supp. 812, 824-25 (D.N.J. 1989) (liability for approximately 350 non-testifying employees based on trial or deposition testimony of 43 witnesses); and very recently, *see Garcia*, 770 F.3d at 1307 (describing representative testimony as competent evidence that can contribute to finding of "class-wide liability").

As one district court whose judgment was affirmed on appeal explained:

> [I]n a typical FLSA case, the [plaintiff] presents testimony from some of the affected employees as part of the proof of a prima facie case. The [plaintiff] then can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement.

Herman v. Hector I. Nieves Transp., Inc., 91 F Supp. 2d 435, 446 (D.P.R. 2000), *aff'd*, 244 F.3d 32 (1st Cir. 2001).

Nor is this capacity for aggregate proof limited to damages. As the Third Circuit recognized, "[i]t is not necessary for every single affected employee to testify in order to *prove violations* or recoup back wages. The testimony and evidence of *representative employees may establish prima facie proof of a pattern and practice of FLSA violations.*" *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991) (emphases added); *see also Herman*, 91 F. Supp. 2d at 446 (once plaintiff establishes that the FLSA was

violated as to testifying employees, "the *existence of the violations* as well as an award of backwages may be inferred for employees that do not testify") (emphasis added).

Put simply, decades of federal case law reveal a clear FLSA policy of allowing plaintiffs to prove both liability and damages in the aggregate, using representative evidence. Iowa law incorporates the FLSA provisions that embody this policy. And Iowa case law gives no indication of any rejection by the state's courts of the FLSA policy in favor of aggregate proof by representative evidence. Accordingly, the IWPCL is properly viewed as favoring a policy of allowing representative evidence in those cases where plaintiffs bring FLSA-derived IWPCL claims. The Rules Enabling Act is thus not violated by allowing representative evidence to prove liability and damages in Rule 23(b)(3) actions under the IWPCL.[13]

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[13] All that is left of Tyson's contention to the contrary (at 36) is the qualifier "who did different activities requiring a different amount of time to perform." But both common sense and experience indicate that not all activities done by all workers in a representative action would be precisely the same; nor would all require precisely the same "amount of time to perform." Further, *Mt. Clemens* made clear that, when employers unlawfully fail to keep records of unlawfully uncompensated work time, employees are not required to do the impossible. The evidence presented by plaintiffs in this case easily meets the *Mt. Clemens* "just and reasonable inference" standard for damages. This evidence, based on a combination of individual time-sheet records with data from an objective time study of the very plant where all class plaintiffs worked, was surely at least as reliable as the testimony of eight employees that the *Mt. Clemens* Court found sufficient for determining damages.

III. DUE PROCESS DOES NOT GIVE A DEFENDANT THE RIGHT TO LITIGATE ALL DEFENSES HOWEVER IT PLEASES, AND TYSON HAD EVERY APPROPRIATE OPPORTUNITY TO RAISE ALL ITS DEFENSES

This Court set forth the framework for evaluating whether governmental action is consonant with a person's due process interests in *Mathews v. Eldridge*. That framework involves a three-pronged inquiry into the risk of deprivation of the person claiming due process protection, the protections provided in the procedural mechanism the government proposes, and the governmental interest in using the proposed procedure rather than feasible alternatives. Applying the *Mathews* framework shows that class-action litigation fits comfortably within the bounds of due process in this case.[14]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332. But due process rights are not inflexible trump cards: "due process, unlike some legal rules, is not a technical

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[14] The *Mathews* framework has been applied in substantive areas involving the most fundamental due process interests. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (assignment to super-max prisons) ("we generally have declined to establish rigid rules and instead have embraced [the] framework . . established in *Mathews*") (Kennedy, J.); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (*habeas corpus* action) ("*Mathews* dictates . . the process due in any given instance").

conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334. Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* And the protections demanded by the situation here were provided.

Tyson argues that it has a due process right to individualized determination as to every individual claim in this action. But even stipulating that Tyson has a due process interest here would hardly give Tyson a trump card allowing it to mount its defense on whatever terms it prefers. Trial plans regularly limit both plaintiffs' and defendants' freedom to maneuver, even in *individual* actions. No one believes Rule 16 or Rule 20 or Federal Rules of Evidence that limit admissibility of relevant evidence are unconstitutional as a consequence. Yet Tyson's argument would render class litigation unconstitutional whenever there are *any* individual questions, even when Rule 23(b)(3)'s requirement that common questions "predominate" over them is satisfied.

Further, the trial that occurred in this case was nothing like the "Trial by Formula" plan that the Ninth Circuit approved and this Court questioned on due process grounds in *Dukes*. Here, Tyson had an opportunity to mount a defense on every issue it raises in its merits brief. In some instances, it hurled fastballs; in others, it lobbed softballs; and in still others it wandered off the mound without delivering a single pitch. In light of all that, Tyson's insistence that it was unable to defend itself is baseless.

The governmental-interest prong of the *Mathews* test also tilts strongly in favor of aggregate litigation allowing representative proof. The burdens on the

judicial system of Tyson's suggested alternative to class-wide litigation—thousands of individual jury trials with the same questions raised repeatedly on cross-examination—are obviously prohibitive.

Finally, while Tyson asserts its due process challenge only in relation to the statistical evidence, the evidence in the record is ample enough for this Court to simply avoid the due process question. The record runs over with non-statistical evidence that would entitle a reasonable jury to find Tyson liable here. And the use of Dr. Mericle's evidence for determining damages easily falls within the standard, which this Court elaborated long ago in *Mt. Clemens*, that applies when an employer such as Tyson fails to keep legally required records.

A. Tyson's Interest Was in Putting Forward Its Defenses on the Merits, Which Tyson Did

Mathews teaches that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. at 333 (quotation marks omitted). Thus, Tyson's interest was to have its defenses heard meaningfully when a court adjudicates its employees' claims, and that interest was vindicated in this case.

At the trial itself, Tyson was afforded a full opportunity to cross-examine plaintiffs' witnesses. On cross-examination, it savagely attacked plaintiffs' expert, Dr. Mericle, concerning supposed methodological flaws in his time study—and evidently the attack drew blood, as the jury awarded far less than plaintiffs requested. Further, Tyson's own brief lists detailed excerpts from the trial transcript of testimony by numerous employee

witnesses that the jury might have taken as the basis for rejecting Dr. Mericle's time study. *See* Pet. Br. 30-31.

Tyson contends (at 37) that in individual trials it could have countered plaintiffs' claims "by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore." Ironically, Tyson makes this contention only after spending pages of its brief (at 30-35) listing "vivid" examples of just such testimony that Tyson elicited from plaintiffs' witnesses. And Tyson neither called to the stand, nor even sought to call, any other employees (including, for example, additional opt-in class members), despite the fact that no Rule or order of court blocked it from doing so.

Tyson's second example of a defense it could have raised at an individual trial is no different. It is true that in an individual trial the company might have shown that "the plaintiff was compensated for time spent donning and doffing apart from any K-Code time, because the particular plaintiff donned equipment after 'gang time' started or when the plaintiff was paid to setup or clean up the production area." Pet. Br. 37. It is also true that in the very next sentence Tyson cites JA90 for a discussion of an "example of an employee who [*testified* he] did all of his post-shift washing of equipment on paid clean-up time." *Id.* (emphasis added).

It is thus simply not true that "[i]n this class action Tyson could not raise such individualized defenses." *Id.* Tyson could and did raise them on a representative basis in the class-wide trial. And, just

as the generality of representative testimony in their favor can benefit plaintiffs as to the entire class, such testimony could be expected also to redound to Tyson's advantage when it favored Tyson.[15]

Tyson's ability to raise exactly the defenses it incorrectly says were denied contrasts dramatically to the procedure this Court rejected in *Dukes*, where:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Dukes, 131 S. Ct. at 2561.

The procedure rejected in *Dukes* really is Trial by Formula, because the claims selected for trial would themselves be sampled, with extrapolation to the rest of the claims in the class. A defendant snagged in such a procedure would not be able to raise defenses relevant to claims that had not been sampled concerning the "crucial [subjective] question *why was I disfavored*." *Id.* at 2552. This case, by contrast, did not involve any such novel procedure, unrepresentative evidence, or lack of a common company policy. Nor, as explained above, did the

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[15] As with its attack on Dr. Mericle, Tyson's success in such cross-examination might well explain why the jury awarded plaintiffs substantially less than they requested.

trial in this case involve any limitation on Tyson's ability to raise defenses that would defeat claims of class-wide liability, which Tyson did with gusto.

B. Tyson Received Ample Procedural Protections

With respect to the FLSA collective action, the procedures here included the standard protections. The FLSA requires that collective-action members give written consent to representation, as hundreds did here. Additionally, represented members of the collective action must be similarly situated to the representative plaintiffs. The district court undertook a detailed analysis of that question, and the case for certifying the FLSA collective action, in the same memorandum opinion that considered certification of the Rule 23 class action. The court expressly found that the factual differences emphasized by Tyson are "small," Pet. App. 99a, a finding to which this Court should defer. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (abuse-of-discretion standard applies to class-certification findings); *see generally* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897 (2014) (explaining vital systemic importance of discretion, especially as to fact-bound issues, in class-certification matters).

With respect to the Rule 23(b)(3) class under Iowa law, Tyson had all the usual protections that attend Rule 23 actions. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997) (requirements of Rule 23 are carefully calibrated to comport with Rules Enabling Act and due process). It had an opportunity to contest class certification following an appropriate period of class discovery. Only after class discovery had occurred, and both

sides had made detailed arguments, did the district court certify the Rule 23(b)(3) class action after expressly "rigorous" analysis. Pet. App. 95a. Tyson moved for decertification following this Court's decision in *Dukes*. It received a full and fair consideration of its argument, which was decidedly weak given that *Dukes* involved a class action certified under a different provision of Rule 23(b)—not to mention the dictum in *Dukes* affirmatively stating that damages actions like this one "belong in Rule 23(b)(3)." 131 S. Ct. at 2558.

After the trial, Tyson renewed its motion for judgment as a matter of law, and for a new trial in the alternative. After the district court denied that motion for the prosaic reason that a reasonable jury could have found for plaintiffs on the basis of the record before it, Tyson appealed its loss to the Eighth Circuit, which properly considered and then rejected Tyson's argument.

Tyson also declined to avail itself of a number of procedural mechanisms that were within its reach. First, Rule 23(f) allowed Tyson to pursue an interlocutory appeal of class certification. Notwithstanding the extraordinary constitutional deprivations and Rules Enabling Act violation Tyson now claims, Tyson did not do so.

Second, Tyson could have filed a motion to exclude one or both of plaintiffs' experts under *Daubert*. Tyson now insists (at 42) to this Court that Dr. Mericle's time study was "unrepresentative" and incapable of yielding any "reasonable inference." Such alleged defects would render an expert's testimony and related exhibits inadmissible under *Daubert*, irrelevant under Rule 401, and thus also inadmissible. It is hornbook law that our adversarial

system places the obligation to object to inadmissible evidence on a party itself. Even were it to mistakenly agree with Tyson's description of Dr. Mericle's time-study evidence, this Court should reject Tyson's attempt to do by end-run what it failed to do forthrightly when the time was ripe.

Third, Tyson could have presented its own time-study expert to convince the jury that Dr. Mericle's figures were inflated. Indeed, Tyson originally planned to call one Dr. Adams as a rebuttal time-study expert. The company subsequently determined that it was "not necessary" to do so, on the basis of deposition testimony given by Dr. Mericle and Dr. Fox. *See* Def's. Mem. Supporting Exclusion of Dr. Adams at 2, ECF 233-1. But, before that time, Tyson actually told the district court that it would be an appropriate question for the jury to decide whether evidence from Dr. Adams or Dr. Mericle was more reliable.[16]

Fourth, Tyson could have chosen not to oppose *plaintiffs'* motion for a bifurcated trial that would have separated liability and damages determinations.[17]

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[16] Referring to its own time-study expert, Dr. Adams, Tyson argued: "[B]oth sides' experts are doing something similar, and the jury will just need to evaluate which one had the *better* measure, is the better expert, and is more reliable." Def's. Resistance to Pls.' Omnibus Motion in Limine at 11, ECF 170.

[17] *See* JA115. Tyson maintained that it opposed a bifurcation of liability and damages because (i) plaintiffs did not give it more notice of their motion for bifurcation, and (ii) it believed liability included some individualized issues. But nothing stopped Tyson from making its own, putatively better-tailored motion either before or after plaintiffs' motion.

Fifth, Tyson could have called its own employee witnesses. The representative plaintiffs were employed at the same Tyson facility as those they represented, wore substantially similar PPE, and were subjected to the same uniform policy of non-compensation. If individualized issues related to liability were as substantial as Tyson claims, it would have had little trouble finding employees who could have testified to this effect, including certain opt-in class members who had elected to become parties to the FLSA case. Tyson obliquely seeks to excuse its failure to do so by citing (at 37-38) to an observation in a treatise mentioning a smattering of district court rulings.[18] But Tyson points to no order of court, because there was none, that limited its ability either to engage in such discovery or to call non-named plaintiffs to testify.

Having availed itself of numerous procedural protections, and elected to forgo many others, Tyson is in no position to argue that it was due any more process. Analysis of the second *Mathews* prong shows that Tyson received ample procedural protections.

C. The Governmental Interests in Class Litigation Were Very Strong in This Case

The third *Mathews* prong requires a court to consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

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18 And even this handful of cases does not uniformly support Tyson's position. *See McCarthy v. Paine Webber Grp., Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) (stating that "[d]iscovery of absent class members" is "not forbidden," even if it is "rarely permitted").

requirement would entail." *Mathews*, 424 U.S. at 335.

One alternative to aggregate litigation in this action would be *no* litigation. But that is a result that this Court should not countenance. Claims like the ones at issue here are precisely the types of relatively small claims for which the Court has said Rule 23(b)(3) was designed. *See Amchem*, 521 U.S. at 617 ("[S]mall recoveries do not provide the incentive for any individual to bring a solo action

A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."). Absent a viable path to class-wide redress of systematic wage-and-hour violations, a company in Tyson's position could thwart the duly enacted laws of the United States and of Iowa.

The alternative that Tyson evidently embraces is a series of individual trials. In these trials, Tyson's merits brief suggests (at 37) the following questions would be raised *seriatim*:

- Q for individual plaintiff: Did you spend time walking to your work station outside gang time? A: Yes.
- Q: Did you use the standard PPE you alleged you used? A: Yes (after all, that is what makes it standard).
- Q: Did you use any additional PPE? A: Yes (just like virtually all other employees at the Storm Lake plant).
- Q: Did you use any of this PPE in a week in which you worked more than 40 hours? A: Yes, because I regularly worked more than 40 hours, and I always used PPE.

- Q: Did Tyson compensate you fully for the donning and doffing of PPE in every week in which you worked more than 40 hours? A: No; Tyson had a uniform policy of not compensating anyone for donning and doffing standard PPE, and I frequently wore additional PPE not covered by K-Code time.
- Q: How much overtime did Tyson fail to pay you as a result of this uniform policy? A: I can't say exactly, because I didn't keep my own records.

Tyson apparently envisions repeated performances of this process, thousands of times, in front of thousands of duly selected juries, over many thousands of days of court time. Such tedious reconstruction and parsing of the minutes each individual employee spent donning and doffing essentially the same gear at the same plant during the same period of time—all to determine the legality *vel non* of an unquestionably common plant-wide pay policy—would hardly befit a system that is supposed "to secure the just, speedy, and inexpensive determination" of anything. Fed. R. Civ. P. 1.

And plaintiffs could introduce representative proof and aggregate statistical evidence in individual trials anyway. Tyson maintains (at 37) that at most it could be required to pay only for the *reasonable* time it takes to don and doff the gear at issue in this case. In determining how long is reasonable, it would surely be relevant how long employees *typically* take to do these activities. The accepted method of answering that question—and the way Tyson calculated its own K-Code time—is via *a time study done by an industrial engineer such as plaintiffs' expert witness Dr. Mericle.* Thus each of

the thousands of individual trials Tyson envisions could easily feature Tyson's own internal "average" time studies or, similarly, the following testimony from an expert such as Dr. Mericle:

- Q: Roughly speaking, how much time does it take employees at the Storm Lake plant to don and doff PPE? A: I did an industry-standard time study and found that the average time spent donning and doffing is 18 minutes for Cut and Trim workers and 21.25 minutes for Kill workers.

To even consider such an alternative is to demonstrate the vital governmental interest in allowing aggregate litigation in this case, and in others like it. Aggregate litigation in this case, whether through the FLSA opt-in class or the Rule 23 Iowa class, is clearly consonant with the Constitution when the scope and character of the claimed constitutional right are taken seriously and considered in context.

D. There Was Sufficient Non-Statistical Evidence To Support the Liability Verdict, Making Statistical Evidence as to Damages Appropriate Under *Mt. Clemens*' "Just and Reasonable Inference" Standard

This Court need not address whether statistical evidence *standing alone* can establish liability consistent with due process, because here this evidence does not stand alone. In its briefing for this Court, Tyson has simply ignored the volumes of stipulations and non-statistical testimony and exhibits that reasonable jurors could have believed support a liability finding. *Accord Mt. Clemens*, 328

U.S. at 687-94; *Garcia*, 770 F.3d at 1307 (describing representative testimony and time-study evidence as competent evidence that can contribute to "finding of class-wide liability").

As to whether plaintiffs worked more than 40 hours, Tyson stipulated before trial that "[h]ourly workers at the Storm Lake plant *tend to work a significant amount of overtime on a weekly basis*." JA122 (emphasis added). Its managers testified to similar effect at trial.[19]

Plaintiffs also presented testimonial evidence of Tyson's class-wide policy of paying zero compensation for donning and doffing standard protective gear worn by all or virtually all class members—including hard hats, work boots, hair nets, frocks, aprons, gloves, ear plugs, and uniforms or outerwear. JA176-78.

And plaintiffs then provided representative testimony from class members concerning the standard and additional PPE they wore, and concerning the typical time spent donning, doffing, and walking. *E.g.*, JA255-65. Tyson's own supervisors testified to similar effect, JA453-55, and the jury had voluminous videotape evidence that allowed jurors to evaluate the relevant donning, doffing, and walking issues for themselves.

A reasonable jury easily could determine that this record established critical issues related to both overtime status and whether donning and doffing the PPE at issue in this case was work and thus should

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[19] *See, e.g.*, JA326 (testimony of top plant manager Mrylon Kizer, whose answer confirmed that "more often than not employees work most Saturdays and have a 48-hour week in the production departments").

have been compensated. Accordingly, the post-verdict posture of this case entitles plaintiffs to the inference that the jury *did* find Tyson liable to plaintiffs on the basis of the record as a whole, and this Court should avoid upsetting a jury verdict based on Tyson's challenge to just one piece of the evidence. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (post-trial review demands "draw[ing] all reasonable inferences in favor" of the verdict in light of the trial "record as a whole," and court must "disregard all evidence favorable to [Tyson] that the jury [was] not required to believe").

Beyond plaintiffs' liability showing, this Court long ago interpreted the relevant provisions of the FLSA to allow an equitable determination of damages where, as here, the employer failed to keep records required by law. *Mt. Clemens*, 328 U.S. at 687. The *Mt. Clemens* Court's reading of the FLSA, which is due the strong form of *stare decisis* usually accorded to statutory interpretations, spares employees the need to do the impossible and prove exact damages where no records exist. Instead, plaintiffs may prove damages as a matter of "just and reasonable inference" using the best available evidence. *Id.* That is just what plaintiffs did here, combining individualized time-sheet records with an industry-standard time study to estimate the amount of uncompensated time.

Finally, contrary to Tyson's argument, the jury was hardly obligated to award either zero damages or damages exactly equal to what plaintiffs requested. A long line of case law establishes that damages are "a matter so peculiarly within the province of the jury that the Court should not alter

it." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009) (Thomas, J.). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-22 (1999) (Kennedy, J.) ("the extent of any resulting damages [is a] question[] for the jury"); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 453 (1996) (Scalia, J., dissenting) ("the proper measure of damages involves only a question of fact") (internal quotation marks omitted).

Applying these Seventh Amendment principles, there is nothing remotely unusual or problematic about a jury's rendering a split-the-difference damage award within the range of the evidence presented at trial. *See, e.g., Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (Posner, J.).[20]

CONCLUSION

For these reasons, this Court should dismiss the writ as improvidently granted or affirm the judgment below.

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[20] This Court should also disregard Tyson's attempt to impeach the testimony from plaintiffs' statistical expert, Dr. Fox, by characterizing her testimony "that 'if the jury concludes the activities take [a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result' without re-running the program." Pet. Br. 13-14 (citing JA425) (alteration in original). The jury in our system is not tasked with predicting variations in an expert witness's computations. The jury is instead asked to determine, on the basis of admissible evidence, the damages it believes to be appropriate based on the trial record as a whole.

Respectfully submitted,

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September 29, 2015

APPENDIX

List of Amici

Each of the individuals listed below joins this brief as an *amicus curiae*. Institutional affiliations are for identification only; none of *amici*'s law schools takes any position on the issues in this case.

Amicus Jonah B. Gelbach is Associate Professor of Law at the University of Pennsylvania Law School, an economist (Ph.D., MIT, 1998), and a former economics professor at the University of Maryland and the University of Arizona's Eller College of Management.

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Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CIVIL PROCEDURE SCHOLARS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE

Amici (listed in the Appendix) are law professors who teach and write about class actions and complex litigation.[1] They have diverse perspectives on the costs and benefits of aggregating claims, but agree that judicial review should focus on the unique factual and legal circumstances of each case. Amici therefore propose narrow grounds for a decision. The Court can provide helpful guidance about managing aggregate proceedings without reconsidering certification criteria or the use of statistical evidence.

SUMMARY OF ARGUMENT

Both parties overreach. Plaintiffs defend the classwide judgment despite failing to prove that all class members were injured. Tyson seeks decertification even though classwide evidence might be available after the Court clarifies the burden of proof. Each party frames the case as implicating broad questions that the record does not raise.

Amici recommend an intermediate position. Tyson is correct that the judgment was unwarranted, but plaintiffs should have an opportunity on remand to present a feasible plan for managing a new trial. The Court should therefore reverse on narrower grounds than the Petition suggests. There is no reason to address the general utility of context-sensitive

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[1] The parties have given blanket written consent to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part. No person other than amici and their counsel—including no party or counsel for a party—made a monetary contribution to the brief's preparation or submission.

statistical methods and review of certification criteria should await the rulemaking process or future cases with records requiring an interpretation of Rule 23(b)(3).

A class may prevail at trial only by proving common allegations and presenting a feasible plan for resolving any remaining individualized disputes. Plaintiffs offered neither proof nor a plan. Their attempt at classwide proof relied on models that glossed over material factual differences between class members. The models at best established that some class members had viable claims. This record was an insufficient foundation for a judgment stating that the entire class was "entitled to additional compensation." The District Court could have salvaged the case by requiring plaintiffs to develop a feasible plan for identifying which class members were injured. Instead, the court authorized a premature and arbitrary classwide judgment.

The problem is not that plaintiffs tried to streamline the case with statistical evidence, but rather that the particular time study they offered failed to prove classwide liability. Correcting the misunderstanding of precedent that led to this mistake does not require fully answering the two questions presented. Broadly spurning "statistical techniques" or categorically prohibiting particular types of class actions would needlessly stifle the case-specific discretion animating Rule 23. Instead, the Court can provide helpful guidance by clarifying that aggregation of dissimilar claims: (1) cannot modify the substantive law that would apply to individual claimants if they litigated separately rather than

collectively; and (2) requires a feasible plan for resolving individualized issues.

Aggregation is not a form of alchemy that transmutes meritless claims into meritorious claims. A plaintiff who should lose on the merits if he sues as an individual should still lose if he raises the same claim as part of a group. Bundling claims may *reveal* merit by facilitating access to justice, but cannot *create* merit by altering the substantive law that would otherwise apply.

Plaintiffs failed to prove classwide liability under the applicable substantive law because their evidence overlooked material dissimilarities among employees with distinct jobs that required distinct gear. An individual employee in a non-aggregated suit would have needed to prove that he spent uncompensated overtime donning and doffing the gear used in his job. Evidence of how much time employees performing different jobs spent donning and doffing different gear would have been irrelevant if the differences were material to liability. Yet aggregation placed that irrelevant evidence at the center of the case. Plaintiffs' time study expert calculated the average time that employees across multiple departments spent donning and doffing. This approach disguised variations between class members, enabling meritless claims to blend in among valid claims. Plaintiffs' damages expert then incorporated the tainted time study into her calculations without accounting for the study's errors.

Recognizing that the plaintiffs' evidence did not address the liability standard applicable to each individual claim renders remaining factual disputes

moot. Tyson may have attempted to undercompensate workers and the disputed analytical methods might have conformed to norms among industrial engineers. But if expert witnesses asked the wrong questions, rigor and accuracy cannot redeem their answers. The jury at a minimum needed to know how much time each materially dissimilar subcategory of workers spent donning and doffing relative to how much compensation each subgroup received. Plaintiffs never provided that information, so the jury could not conclude that Tyson injured the entire class.

Reversal would be a frustrating result given the jury's verdict and extensive evidence that Tyson underpaid many employees. Other donning and doffing class actions have appropriately accounted for individualized issues; this one did not. Plaintiffs made poor choices about how to structure the case and the District Court erroneously endorsed their approach. An opinion from this Court highlighting the importance of fidelity to substantive law and careful management of individual issues would help courts avoid similar errors in the future.

The errors below do not necessarily foreclose continued certification. Plaintiffs should have an opportunity on remand to show that they can develop a feasible plan for resolving individual claims at a new trial. Vacating the judgment due to insufficient evidence and improper case management would enable the parties to litigate whether certification remains viable under a revised understanding of plaintiffs' burden of proof.

Given that the Court can reverse on narrow grounds that would clarify aggregation jurisprudence,

there is no reason to consider whether the class should have been certified or whether certification can be maintained. The best answer to the two broad questions that Tyson presents about whether statistical evidence and diverse classes are appropriate is: maybe, depending on the circumstances. Cataloging those circumstances in a single opinion would be neither possible nor prudent. A decision addressing matters beyond the District Court's context-sensitive errors would have unpredictable consequences in myriad fields where aggregation is fair and efficient.

ARGUMENT

I. Plaintiffs' Reliance on Averages Obscured Dissimilarities Between Individual Claims that Were Material to Liability

A simple hypothetical variation of the present case highlights the District Court's error. Suppose that an employee at Tyson's Storm Lake plant filed a complaint that was identical to Ms. Bouaphakeo's actual complaint, but without the class and collective action allegations. Further suppose that at trial, the plaintiff did not present any evidence about how much time she spent donning and doffing her gear and how much of this time was uncompensated. Instead, she proved how much time another employee in a different department spent donning and doffing materially different gear and how much that other employee was underpaid. The hypothetical plaintiff should lose: she must prove her own entitlement to damages, not someone else's entitlement. See 29 U.S.C. § 216(b) (employer is liable only "to the employee or employees affected" by underpayment);

Iowa Code § 91A.8 (employer is liable only "to the employee" that it "failed to pay"). Evidence about other employees in *similar* circumstances could be probative, but a plaintiff cannot rely entirely on evidence about materially *dissimilar* employees.

Relabeling the hypothetical claimant as a class member rather than a named plaintiff does not obviate proof that she was injured. Aggregation facilitates proof but does not dispense with the need for proof, alter the elements of a claim, or eliminate defenses.

If a class encompasses materially dissimilar members, the District Court must have a plan for resolving individualized issues before entering a classwide judgment. That required parsing of dissimilar claims never happened in this case. Instead, the plaintiffs' effort to blur distinctions between class members was a troubling example of how:

> [D]issimilarity creates subtle distortions in the presentation and assessment of claims and defenses that either inflate or dilute the perceived value of the overall class claim.... [T]hese distortions [include]: "cherry-picking" (the tendency of aggregate proceedings to generalize from examples that do not fully represent the diversity of individual claims), "claim fusion" (the process by which claims in the aggregate merge to assume characteristics that no individual claim possesses), and "ad hoc lawmaking" (the manipulation of substantive rules to assist in resolving or

> preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law).

Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1003 (2005) (footnote omitted).

Lawmakers may avoid the practical obstacles that dissimilarity poses for aggregation by designing substantive rules that do not require individualized proof. For example, a perceived need to "facilitate[] class certification" may have inspired the fraud on the market doctrine in securities law. *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Similar reforms have reshaped other fields. See, *e.g.*, Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 Tul. L. Rev. 1633 (2000) (discussing rules that facilitate aggregate proof in implied and express warranty actions). A desire to bolster aggregate remedies can be an appropriate impetus for substantive innovation when drafting or interpreting statutes or when federal courts develop common law. In contrast, federal courts have no authority to circumvent inconvenient substantive rules in order to manage a particular trial. Neither Congress nor the Iowa legislature eliminated individualized elements of donning and doffing claims. Individualized elements therefore should have shaped plaintiffs' burden of proof.

A. Neither Rule 23 nor the FLSA's Collective Action Provision Modify Otherwise Applicable Liability Standards

1. Rule 23 Requires Fidelity to Substantive Law

Class actions are a valuable mechanism for *revealing* the merit of claims that otherwise might have been abandoned or litigated ineffectively. However, certification cannot *create* merit by changing the liability standard or foreclosing defenses. "There is a difference between allowing the resources that certification brings to polish a diamond hidden in the rough and allowing the pressure that certification brings to create a diamond from coal." Erbsen, 58 Vand. L. Rev. at 1043.[2]

First, Rule 23's text does not modify the otherwise applicable substantive law. Instead, the Rule posits that individual plaintiffs have "claims" before certification that will resemble the "claims" of class members after certification. Fed. R. Civ. P. 23(a)(3). Likewise, "defenses" to individual claims before

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[2] The plurality and dissenting opinions in *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.* made a similar point. See 559 U.S. 393, 409 (2010) (plurality opinion) (holding that class actions do not violate the Rules Enabling Act simply because they encourage plaintiffs to sue and raise the stakes for defendants); *id.* at 408 (plurality opinion) ("A class action ... merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *id.* at 447 (Ginsburg, J., dissenting) (distinguishing between the "method of enforcing a claim" and "the claim itself").

certification will resemble "defenses" to class members' claims after certification. *Id.* Nothing in Rule 23's authorization of certification purports to transform the content of claims and defenses. See *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.").

Second, if there were any doubt that Rule 23's text preserves the otherwise applicable substantive law, the Rules Enabling Act would preclude a more "adventurous" interpretation. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). The Act requires that "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rule 23 therefore cannot be read to "modify" the elements of a claim under Iowa's Wage Payment and Collection Law (IWPCL).

The Court has repeatedly cautioned that applying Rule 23 requires sensitivity to the Enabling Act. See *Wal-Mart*, 131 S. Ct. at 2561; *Ortiz*, 527 U.S. at 845; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). The District and Circuit Court decisions in this case suggest that the message has not been fully received. The Court might consider clarifying that compliance with the Enabling Act requires courts to assess the merit of claims in a class action using the same substantive standards that would apply if each claim were litigated individually. The *method of proof* may differ in a class action, but *what must be proven* remains the same. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10, 14 (1941) (holding that the FRCP can change the "process for enforcing rights" but cannot

alter the content of those rights under the "guise" of procedural reform).

Third, absent federal preemption, the *Erie* doctrine requires faithfully applying Iowa law. See *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Neither party has raised preemption before this Court.

Accordingly, Rule 23 creates procedural efficiencies without authorizing substantive shortcuts. The boundary between procedure and substance is often opaque, but state law determines the facts that a claimant must prove to recover damages under a state statute. See *Marshall* v. *Marshall*, 547 U.S. 293, 313 (2006) ("It is clear, under *Erie*" that state law provides the "substantive elements" of a claim).[3]

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[3] Amici's analysis applies only to class actions in federal court. Rule 23, the Enabling Act, and *Erie* would be irrelevant in state court. Aggregating dissimilar claims in state court would raise additional questions, including whether the Due Process Clause prohibits application of state class action rules in a manner that modifies the otherwise applicable substantive law. See U.S. Const. amend. XIV, § 1. The constitutional question is more complicated than litigants typically acknowledge because a state court decision foreclosing defenses to individual claims could be characterized in two ways with distinct implications: (1) as circumventing substantive law, which might violate due process; or (2) as interpreting substantive law to deny the existence of defenses, which may be within the court's authority as an expositor of state law. See *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (discussing rejection of a reliance defense in a class action alleging fraud under Louisiana law). Addressing due process would entail several complex inquiries that the present record does not require or support. See, *e.g.*, Erbsen, 58 Vand. L. Rev. at 1040 (noting that modifying otherwise applicable substantive law may violate due

2. The FLSA's Collective Action Provision Provides a Remedy Without Altering Claims and Defenses

Collective actions under 29 U.S.C. § 216(b) can be an efficient mechanism for challenging broadly applicable payment practices. See *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989) ("The broad remedial goal of the statute should be enforced to the full extent of its terms."). But like class actions under Rule 23, collective actions under Section 216(b) do not obviate proof that each claimant was injured.

Section 216(b)'s text does not alter the content of claims in a collective action. The first sentence limits relief to workers who are "affected" by an illegal practice, and only in relation to the "amount" of their loss. 29 U.S.C. § 216(b). The third sentence authorizes collective remedies, but expressly incorporates the description of "liability prescribed" in the first sentence. *Id.* No language suggests that elements of a claim expand or contract depending on whether the claim is raised individually or collectively.

Accordingly, a claim that would lack merit under Section 216(b) if filed by a single employee suing alone

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process if a defendant is "unable to conform its conduct to rules that vary with the procedural context of a claim, thus rendering it liable to groups for conduct that is not illegal with respect to any individual member of the group."); Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319 (2012) (discussing historical evidence that complicates analysis of due process arguments in class actions); Judith Resnik, *Fairness in Numbers*, 125 Harv. L. Rev. 78 (2011) (noting that analyzing due process requires considering an array of public and private interests that litigants often overlook).

would still lack merit if filed by an employee who is part of a collective litigation unit. Collective actions streamline litigation but do not streamline claims.

Congress may of course amend the FLSA to facilitate proof of collectively filed allegations. For example, an amendment could enable employees to prove that an employer had a policy of miscalculating overtime, compel an employer with such a policy to pay a penalty, and allow equitable distribution of the penalty among employees without requiring proof that specific employees were underpaid. Such an amendment would make collective actions more effective tools for policing misconduct by employers.

The classwide judgment resembles what the hypothetical amendment to the FLSA would authorize. However, the judgment is inconsistent with what Congress currently requires.

B. Plaintiffs Failed to Prove Classwide Liability

Given that aggregation did not alter the substantive law applicable to each beneficiary of the classwide judgment, the Court confronts two questions. First, what facts would establish a violation of the FLSA and IWPCL? Second, did the jury receive evidence capable of proving those facts for the entire class? Reviewing the statutes and trial record establishes that plaintiffs failed to prove

required facts because they used aggregation as an excuse to circumvent substantive liability standards.[4]

1. The FLSA and IWPCL Required Proof that Tyson Underpaid Each Claimant

The FLSA and IWPCL condition liability on proof that each claimant: (1) spent compensable time donning and doffing that (2) was not compensated. Plaintiffs can potentially prove these facts using aggregate data, but only if the data accounts for variations that could prevent some claimants from establishing liability. For example, liability would not exist if an employee's donning and doffing occurred during paid shifts, if overtime payments covered pre- or post-shift work, or if the employee worked less than forty hours per week.

First, the FLSA conditions liability for overtime on proof that the employer underpaid each claimant by a specific amount. The statute creates a right to sue only when an "employee" alleges that "his employment" exceeded forty hours in a week. 29 U.S.C. § 207(a)(1). If the employee worked overtime, the statute entitles him to 150% of the rate that "he" normally earned. *Id.* Time spent donning and doffing is compensable as overtime only if "an employee"

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[4] The District Court instructed the jury that the IWPCL and FLSA impose "the same" "duplicative" standards, J.A. 479, and the large IWPCL class mostly subsumed the small FLSA class, J.A. 117. The parties therefore focused on the FLSA's substantive provision but not its aggregation provision, and they avoided the IWPCL's substantive language while emphasizing Rule 23. This case is therefore about how a federal procedural rule enforces a state law that duplicates a federal law governed by a different federal procedure.

alleges that the time is part of the "principal activity" in which "he" engages. *Id.* § 254(a). Damages are available only to "the employee or employees affected" by a violation. *Id.* § 216(b). Calculation of damages is based on "the amount" of wrongfully withheld compensation. *Id.*

Second, the IWPCL similarly conditions liability on proof that an employer withheld a specified amount from each claimant. Employees are entitled only to "wages" that are "due." Iowa Code § 91A.3(1). A "wage" is due only when "owed" as "compensation." *Id.* § 91A.2(7)(a). An employer that withholds required compensation is liable only "to the employee" for an amount based on the specific "wages" that it "failed" to pay. *Id.* § 91A.8. The statute is thus "remedial," focusing on a specific group ("employees" who are "owed" wages) for a specific purpose (enabling them "to collect wages"). *Hornby* v. *State*, 559 N.W.2d 23, 26 (Iowa 1997).

Statutory text linking liability to underpayment of each complaining worker means that donning and doffing claims are job-specific rather than plant-specific. Where the employee works is less important than what the employee wears. The fact that one employee was underpaid for donning and doffing one type of gear does not prove that an adjacent employee was underpaid for donning and doffing a materially different type of gear. A claimant may prevail only if the record contains proof that she was underpaid based on her own circumstances or those of her similarly situated coworkers.

This interpretation is consistent with the Court's opinion in *Anderson* v. *Mt. Clemens Pottery Co.*, 328

U.S. 680 (1946), on which plaintiffs rely. Br. in Opp. 5–9. *Anderson* might justify an imprecise calculation of damages when the entire class was injured, but it cannot justify a judgment for plaintiffs who never proved liability. In *Anderson*, the Court observed that "exactness and precision" in measuring unpaid overtime are often unattainable. *Id.* at 688. "[R]easonable inferences" from probative evidence can therefore suffice when defendants do not maintain comprehensive time records. *Id.* at 693. However, the Court conditioned its willingness to tolerate imprecise overtime calculations on proof that "damage" was "certain." *Id.* at 688. Each employee must prove that "he has performed work and has not been paid." *Id.* Nothing in *Anderson* suggests that a plaintiff can prove liability by showing that the defendant underpaid the "average" employee when the average obscures material variations.

Under *Anderson*, the appropriate manner of proving donning and doffing claims depends on the degree of variation among clothing requirements for different work groups. For example, imagine two hypothetical meat-processing plants that each employ one thousand workers who must wear cumbersome clothing. Plant *X* requires each worker to wear the identical uniform, while Plant *Y* employs three groups of workers who each wear materially different gear. Proving aggregate claims will be easier in suits involving Plant *X* than in suits involving Plant *Y*. An expert could study an appropriate sample of workers at Plant *X* and extrapolate donning and doffing times to the entire plant. But an expert studying Plant *Y* would need to analyze three distinct work groups and present distinct conclusions for each.

The problem in this case is that the District Court treated Tyson's Storm Lake facility like the homogenous Plant *X* even though it more closely resembled the heterogeneous Plant *Y*.

2. The Jury Had No Basis for Finding that Tyson Underpaid the Entire Class Because Plaintiffs' Time Study Ignored Material Dissimilarities Among Class Members

Plaintiffs' reliance on broad averages would have been appropriate only if class members were similarly situated. If the class was homogenous, then a statistical average would be an appropriate form of proof. An average would sacrifice accuracy about outliers—such as unusually speedy donners or lethargic doffers—for the sake of efficiently enforcing statutory rights. See *Steiner* v. *Mitchell*, 350 U.S. 247, 251 (1956) (apparently accepting finding in donning and doffing case that "each" employee spent "ten minutes in the morning and twenty minutes in the afternoon" bathing even though these uniform times presumably were averages). There is no reason to believe that the FLSA—which expressly contemplates collective litigation—requires all similarly situated workers to testify when a representative sample could prove the point.

If the class was materially heterogeneous, then expert testimony about overall average donning and doffing times could not establish classwide liability. For example, suppose that a statute requires employers to provide a twenty-minute break each day. A class of one hundred employees sues and the evidence eventually shows that forty received a ten-

minute break while sixty received a twenty-minute break. Most of the class clearly cannot prove liability—they received the required twenty-minute break. Yet the average break for the class as a whole was sixteen minutes. Expert testimony about the average would create an illusion that 100% of the class was underpaid by four minutes each, even though 60% were fully paid. Donning and doffing claims are more complicated than the hypothetical break claim, but the same principle applies: averages by definition disguise variations. Sometimes variations do not matter, in which case relying on averages can be fair and efficient. But if variations are material to liability, then averaging them away would ignore the substantive law.

The materiality of a variation is a question unique to each area of substantive law and each disputed fact. A decision that the factual variations in this case precluded averaging under the FLSA or IWPCL would not preclude using averages to efficiently establish different facts in different substantive contexts. See *infra* Part II(A).

The class in this case was heterogeneous and plaintiffs' evidence failed to account for material factual variations. This fact-bound oversight, rather than any inherent flaw in statistical reasoning, requires reversal for a combination of six reasons.

First, the record establishes at least three kinds of material factual variations: (1) some positions used distinct gear that required distinct donning and doffing times; (2) some work groups were subject to distinct practices for calculating overtime; and (3) some donning and doffing occurred during paid

portions of the work day. Amici will not repeat the extensive discussion of these variables in Tyson's brief. Pet. Br. 4–15, 29–34.

Although factual variations seem peripheral in light of evidence that Tyson often underpaid workers, the District Court still should not have entered a *classwide* judgment. Evidence of systematic underpayment was a good reason to aggregate claims. But evidence that these practices did not injure the entire class was a reason to manage variations rather than ignore them. The District Court should have developed a plan for identifying workers who could not prove liability. See *infra* Part II(B). This parsing could have occurred either during the trial or in a post-trial claims resolution process. Instead, the court skipped directly to a classwide judgment stating that all class members were entitled to compensation. The error is frustrating given the extensive resources that this case has consumed, but it is nevertheless inexcusable under the applicable substantive law. Small factual variations may be immaterial under many statutes, but the Court has interpreted the FLSA as being "*all about* ... the relatively insignificant periods of time" required to donn and doff distinct gear. *Sandifer* v. *U.S. Steel Corp.*, 134 S. Ct. 870, 880 (2014) (emphasis in original).

Second, plaintiffs' time-study expert (Kenneth Mericle) admitted that he ignored factual variations between class members. Mericle conceded that he: (1) did not study a "random" sample (J.A. 378–79) and that up to 40% of the plant's workers did not wear various items that he included in his calculations (J.A. 392); (2) lumped all the plant's workers into two

groups—"kill" and "fabrication"—and provided an average donning and doffing time for each group (J.A. 361–62); (3) collapsed two distinct departments—"cut" and "retrim"—into the "fabrication" category (J.A. 363–64); (4) did not separately measure numerous "small departments" (*id.*); (5) made no effort to identify the "specific job an individual does" because doing so would "slow" his analysis (J.A. 355–56); and (6) recognized that plaintiffs' use of distinct gear distorted his averages yet made no effort to control for these variations. See J.A. 388 ("Q. One of the reasons for the difference in times is different combinations of clothing, right? A. Yes."); J.A. 376 ("I didn't differentiate between knife users and non-knife users.").

When confronted with his omissions, Mericle opined:

> I think, you know, that [the jury] could repeat the study using a different methodology if they wanted to ....

Tr. 1051. The jury was in no position to perform complex quantitative analysis on hundreds of video studies and thousands of spreadsheet entries. Plaintiffs themselves suggested when discussing Mericle's credentials that only a qualified expert was capable of such modeling. Tr. 827–40.

Mericle's indifference to factual variations among class members rendered him unable to parse meritless claims from meritorious claims. When an expert's "testimony does nothing to advance" a party's case, the Court "can safely disregard what he has to say." *Wal-Mart*, 131 S. Ct. at 2554.

Third, plaintiffs' damages expert (Liesl Fox) admitted that her damages calculations relied on Mericle's averages. J.A. 418. This was a fatal error because Fox conceded that liability was not linear. If lowering the estimated donning and doffing time for a particular worker reduced his weekly hours below the amount for which he had been fully compensated, then he had no claim. J.A. 424–25. For example, a 10% reduction in estimated donning and doffing time would not necessarily translate into a 10% reduction in damages; instead, damages could plummet to zero because there was no injury. Proving liability therefore required measuring the difference between: (1) the time for which employees doing a particular job were paid; and (2) the time the employees actually worked. Fox knew how much employees with particular job codes were paid, but she did not know how long they actually worked. She therefore could not prove classwide liability.

Plaintiffs cannot contend that differences between jobs were immaterial to liability because they had the burden of proving material similarity yet never systematically measured variations. Mericle needed to prove rather than assume that employee *A* in department *B* using equipment *C* spent a materially similar amount of time donning and doffing as employee *X* in department *Y* using equipment *Z*. Class certification does not create a presumption at trial that claims are materially similar; otherwise, certification would invert the substantive law's burden of proof. See *supra* Part I(A). Plaintiffs must in some fashion prove all class members' claims rather than forcing the defendant to disprove its liability to particular employees.

Even if the Court were inclined to impose classwide donning and doffing liability based on rough overall averages, the liability standard would presumably distinguish between "acceptably rough" and "too rough." Mericle and Fox failed to provide any data that would allow the Court to apply that distinction in this case. Their failure is especially salient in a legal regime where even a few minutes per week—which in other contexts might be immaterial—can be the tipping point between no liability and millions of dollars in damages.

Fourth, the jury rejected plaintiffs' estimates, yet had no other basis for finding classwide liability. Plaintiffs conceded that the jury awarded exactly 50% less than Fox calculated. Resp. C.A. Br. 44. This across the board reduction is exactly what Fox admitted the jury could not do because liability was not linear:

> Q. If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?
> A. No, you cannot.

J.A. 424–25. After finding that plaintiffs' models were fundamentally inaccurate, the jury had no basis for awarding *any* classwide remedy given that numerous class members would lack a valid claim. Juries in many cases can permissibly award much less than plaintiffs request. But this case is unusual. The combination of non-linear liability, reliance on broad averages to obscure material variations among class members, and a 50% reduction in damages indicates that the judgment benefits claimants who were not

injured. A model supporting aggregate liability "need not be exact," but it cannot be "arbitrary." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013).

Fifth, plaintiffs inadvertently highlighted the confusion their models had wrought. During closing arguments, they conceded that the class contained "about 3,344 people, not all of whom are due any money." Tr. 1721. Yet the jury awarded money to the entire class. The verdict form states that "the plaintiffs" are "entitled to additional compensation." J.A. 487. A subsequent claims proceeding that attempts to reject individual class members' claims could raise Seventh Amendment concerns. See U.S. Const. amend. VII ("no fact tried by a jury, shall be otherwise re-examined").

The District Court should have prevented this disarray by planning for a claims resolution process *before* submitting aggregate damages to the jury. See *infra* Part II(B). A post-trial claims proceeding is an appropriate way to allocate damages, but only if the initial judgment is structured to account for the additional litigation.

Finally, all remaining factual disputes are moot even if the record is construed in the light most favorable to the plaintiffs. Tyson could have sought to underpay its workers and obscure its misconduct with inadequate records. Mericle could in turn have used unassailable observational methods to calculate average donning and doffing times and Fox could have correctly analyzed millions of data entries. Even so, Mericle's time study ignored the governing substantive law by lumping meritless claims together with meritorious claims. *Comcast*, 133 S. Ct. at 1433–

34 n.5 (distinguishing factual accuracy of data from the legal question of "what those data prove").

Amici take no position on plaintiffs' argument that Tyson waived the foregoing objections to the classwide judgment. However, amici offer an observation about how to analyze waiver: adaptation to aggregation generally should not be treated as acquiescence. Defendants who unsuccessfully oppose aggregation cannot endlessly refight that lost battle at the expense of trying to win on the merits. Tactical decisions made in an effort to prevail at trial attempt to mitigate the alleged prejudice of aggregation without necessarily conceding that aggregation was appropriate. Treating these tactical decisions as waiving prior objections would punish the defendant for defending itself. Amici express no view about how this approach to waiver would apply to the present record.

C. The Appropriate Remedy Would Be to Vacate the Aggregate Damages Award and Remand for Consideration of Whether Plaintiffs Have a Feasible Plan for a New Trial

Getting lost in the labyrinth of aggregative procedure should not permanently preclude access to justice. Plaintiffs followed a path that both the District and Circuit courts thought was available. An appropriate remedy for this error would be to vacate the jury's aggregate damages award without foreclosing further aggregate proceedings.[5]

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[5] Plaintiffs prevailed on four of the verdict form's five questions. See J.A. 486–87. This brief focuses on the fifth question, which

The question for the Court to decide is what the certified class needed to prove in order to prevail. If classwide proof was insufficient, the propriety of continued certification would be an issue on remand. The parties would address certification with the benefit of this Court's assessment of the trial and a revised adjudication plan from plaintiffs. Prior donning and doffing cases in which claimants acknowledged and accounted for material variations among employees would provide a helpful template.[6]

Accordingly, the Court should reverse the denial of Tyson's motion for a new trial, with leave for Tyson to move for decertification on remand if plaintiffs fail to present a feasible adjudication plan. See *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 172 (2007); *City of Canton* v. *Harris*, 489 U.S. 378, 392 (1989).

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addressed aggregate liability and damages. Amici express no view about whether the errors invalidating the judgment on question five also affect questions one through four.

[6] See *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 4–5 (1st Cir. 2003), aff'd in part, rev'd in part, 546 U.S. 21 (2005); *Farris* v. *Cnty. of Riverside*, 667 F. Supp. 2d 1151, 1154 (C.D. Cal. 2009). See also *Lugo* v. *Farmer's Pride Inc.*, No. CIV 07-0749, 2010 WL 5060994, at *2 (E.D. Pa. Dec. 10, 2010) (after court decertified donning and doffing action due to "extensive variation ... [in] whether and by how much any given Plaintiff was unlawfully undercompensated," plaintiffs proposed six relatively homogenous subclasses and court agreed to try one as a test case).

II. The Record Does Not Warrant a Broad Inquiry into Context-Sensitive Questions About Statistical Evidence and Certification Criteria

Judicial decisionmaking benefits from "sharply presented issues in a concrete factual setting." *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980). The factual setting of this case does not present the full range of issues raised in the Petition. Specifically, the record does not require: (1) considering the general utility of "statistical techniques" such as averaging and sampling; or (2) deciding when courts may certify classes that contain a mix of injured and uninjured claimants.

Courts managing aggregate litigation apply flexible procedural and evidentiary standards to the circumstances of each case. A district court must "determine the course of proceedings" and "prevent ... complication in presenting evidence," Fed. R. Civ. P 23(d)(1)(A), consider "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," *id.* at 16(c)(2)(L), and ensure that expert testimony is based on "sufficient ... data" that is "reliably applied" to the "facts of the case," Fed. R. Evid. 702.

Flexible standards are difficult to apply in part because, as Judge Friendly observed, "no two cases will be exactly alike." *Abrams* v. *Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) (affirming denial of class certification on manageability grounds after close scrutiny of the record). Courts can assess whether a particular aggregative technique is appropriate only

by carefully considering the relevant facts, governing law, and proposed management plan. See American Law Institute, *Principles of the Law of Aggregate Litigation* §§ 1.03, 2.02, 2.12 (2010).

The importance of context suggests that the Court should approach the questions presented with caution and restraint. See *Waters* v. *Churchill*, 511 U.S. 661, 686 (1994) (Scalia, J., concurring) (noting that the Court should avoid a conclusion that is "superfluous to the decision in the present case" and "unpredictable in its application and consequences"). A single broad sentence in an opinion about pork processing could unsettle the myriad fields where class actions promote access to justice, including civil rights, antitrust, securities, and consumer protection.

A light touch would also be appropriate to accommodate the Enabling Act's rulemaking process. The Advisory Committee on Civil Rules has formed a subcommittee to consider potential reforms to Rule 23.[7] If revisions to certification and case management criteria are necessary, they should evolve through notice and comment rulemaking. This preference for rulemaking underlies the Court's holding that it is "bound to follow Rule 23" and is "not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz*, 527 U.S. at 861. Even if the Court were "convinced" that a proposed "standard would more effectively promote the goals of" Rule 23, the Court "would not be free to implement this standard outside of the rulemaking process." *Bus.*

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[7] See *Rule 23 Subcommittee Report* (Apr. 2015), available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015.

Guides, Inc. v. *Chromatic Commc'ns Enters.*, 498 U.S. 533, 549 (1991). The Court strives "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989).

A. The Suitability of "Statistical Techniques" Depends on the Factual and Legal Context, Is Not an Issue in this Case, and Is Already Subject to Extensive Guidance

This Court presumably would not entertain a proposal to condemn the use of "mathematical techniques" in litigation. Even though many lawyers seem uncomfortable with math, litigation is often an exercise in quantification. Courts routinely estimate the costs and benefits of conduct, the amount of damages, and the probability that various events occurred.

The "statistical techniques" that the petition asks the Court to address are merely a species of math. Statistical evidence is neither categorically appropriate nor categorically suspect. Instead, statistics are context-sensitive tools that help courts decide if a particular fact is true or a particular argument is persuasive. See Fed. R. Evid. 102 (stressing importance of "ascertaining the truth and securing a just determination").

Like any tool, statistics can be misused. Statistical analysis can be poorly implemented in a context where it would otherwise be helpful, carefully implemented in a context where it does not belong, or rigorously applied in an appropriate context but given undue weight. The present case involves the use of averages where they did not belong because the time

study obscured variations among class members that were material to liability. Reversal on that narrow ground would obviate consideration of how courts adjudicating different cases under different substantive laws should evaluate different methods used by different experts for different purposes. Caution in addressing the use of statistics in aggregate litigation is especially appropriate for three reasons.

First, any discussion of statistics in this case will have unpredictable ripple effects because statistical analysis is ubiquitous in legal reasoning. Courts routinely rely on sampling, averaging, imputation, and extrapolation when applying myriad legal rules in myriad factual contexts. For example, this Court has relied on statistics when analyzing such issues as: discrimination based on race,[8] sex,[9] and national origin,[10] assessment of taxes under the Internal Revenue Code,[11] market dynamics under antitrust

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[8] See *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977) ("[O]ur cases make it unmistakably clear that '(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." (quoting *Mayor of Phila.* v. *Educ. Equal. League*, 415 U.S. 605, 620 (1974))).

[9] See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 270–75 (1989) (O'Connor, J., concurring in the judgment) (discussing precedent about the use of statistical evidence).

[10] See *Castaneda* v. *Partida*, 430 U.S. 482, 496 n.17 (1977) (analyzing statistical techniques used to prove intentional exclusion of Mexican-Americans from grand juries).

[11] See *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 243 (2002) (noting various statistical methods by which the IRS "*estimates* an individual's tax liability") (emphasis in original).

law,[12] congressional apportionment[13] and redistricting,[14] state enforcement of federal regulations,[15] and regulatory variances under the Clean Water Act.[16] Likewise, scholars have discussed the use of quantitative methods for analyzing a diverse range of additional issues, including the standard of care in medical malpractice suits,[17] consumer confusion in trademark infringement actions,[18] application of the federal sentencing

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[12] See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 341 (1962) ("There is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample.").

[13] See *Utah* v. *Evans*, 536 U.S. 452, 464–79 (2002) (discussing distinction between statistical "sampling" and statistical "imputation" or "inference").

[14] See *Abrams* v. *Johnson*, 521 U.S. 74, 98–101 (1997) (reviewing statistical evidence).

[15] See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 531 n.18 (1977) (rejecting contention "that States may not use valid statistical sampling techniques, including reliance on lot average weights, to police compliance with federal and valid state net-weight labeling laws").

[16] See *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council, Inc.*, 470 U.S. 116, 132 n.24 (1985) (rejecting challenge to the EPA's use of "statistical methodologies" to grant variances from effluent limitations).

[17] See William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 Duke L.J. 629, 631 (2001) ("The legal system should rely, whenever it can and far more than it now does, on statistical data about doctors' performance rather than on the opinions of experts about doctors' performance.").

[18] See Daniel Gervais & Julie M. Latsko, *Who Cares About the 85 Percent? Reconsidering Survey Evidence of Online Confusion in Trademark Cases*, 96 J. Pat. & Trademark Off. Soc'y 265, 293–95 (2014) (proposing nuanced analysis of survey data).

guidelines,[19] adjudication by administrative agencies,[20] and actuarial predictions of future dangerousness that influence detention of sex offenders[21] and imposition of the death penalty.[22]

The preceding list of fields infused with statistics blurs numerous distinctions between the methodology, purpose, and complexity of statistical evidence. That variation illustrates why restraint is necessary: critical distinctions could easily be overlooked if the Court assesses statistical tools such as averaging and sampling in the abstract rather than in a narrow and well-defined context. The Court might attempt to confine the precedential force of any opinion addressing statistical evidence to the specific

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[19] See Alan Julian Izenman, *Statistical Issues in the Application of the Federal Sentencing Guidelines in Drug, Pornography, and Fraud Cases*, in *Statistical Science in the Courtroom* (Joseph L. Gastwirth ed., 2000) (discussing use of sampling when sentences depend on calculating the amount of harm caused or the amount of items possessed).

[20] See Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2060–63 (2012) (considering how administrative law judges should review statistical evidence).

[21] See Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 Am. Crim. L. Rev. 1443, 1444 (2003) (contending that "actuarial methods have proven equal or superior to clinical judgments").

[22] See Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1252 (2000) ("Studies have found the fate of capital defendants in Texas and Oregon is determined almost entirely by juries' deliberations on, and emotional responses to, the punishment inquiry concerning defendants' future dangerousness.").

facts of this case. But some seepage across doctrinal boundaries is inevitable because lawyers and judges will read the tea leaves for signs of the Court's approach to statistical methods.

Second, even if limited to the context of proving classwide liability in aggregate litigation, a discussion of statistical evidence would require more nuance then the present record could support. Scholars have repeatedly demonstrated that statistical evidence can either vindicate or undermine substantive rights in aggregate proceedings. Context is critical. Courts must consider the purpose for which statistics are used (such as proving liability, damages, or both), the specific methods employed, how and to what extent class members' factual circumstances materially vary, the elements of claims and defenses, whether cognitive biases might distort the presentation or perception of statistics, the interaction between statistical evidence and more traditional forms of evidence in painting a coherent picture for the trier of fact, and the costs and benefits of the best alternative to statistical evidence.[23] The Court has similarly observed that statistical models supporting aggregate litigation must account for the factual and legal context. See *Comcast*, 133 S. Ct. at 1433 (limiting its

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[23] See, *e.g.*, Robert G. Bone, *Normative Evaluation of Actuarial Litigation*, 18 Conn. Ins. L.J. 227 (2011–2012); Alexandra D. Lahav, *The Case for "Trial By Formula,"* 90 Tex. L. Rev. 571 (2012); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459 (2015); Laurens Walker & John Monahan, *Sampling Liability*, 85 Va. L. Rev. 329 (1999); sources cited *infra* notes 24–25.

analysis to a particular econometric model in an antitrust class action).

The failure of two witnesses to analyze one slaughterhouse does not signal a deeper problem requiring comment from the Court. Plaintiffs' time study was flawed because it ignored the governing substantive law. See *supra* Part I(B)(2). This error should not indict the use of averaging and sampling in countless cases by experts in such diverse disciplines as economics, political science, environmental studies, psychiatry, epidemiology, criminology, and sociology.

Third, to the extent the Court is concerned that lower courts need guidance about the proper use of statistics, ample guidance already exists. For example, the Federal Judicial Center's *Reference Manual on Scientific Evidence* devotes 297 pages to statistical analysis,[24] and treatises cover statistical evidence at length.[25] Calling attention to these sources would be helpful, but an extended discussion of "statistical techniques" divorced from the time study in this case could do more harm than good.

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[24] *Reference Manual on Scientific Evidence* 211–423, 549–632 (3d ed. 2011) (chapters on "statistics," "multiple regression," "survey research," and "epidemiology").

[25] See 1 David L. Faigman et al., *Modern Scientific Evidence* §§ 6:1–6:55 (2014) (chapter on "statistical proof"); David H. Kaye et al., *The New Wigmore: Expert Evidence* §§ 12.1–12.10 (2014) (chapter on "statistical studies"); 4 William Rubenstein et al., *Newberg on Class Actions* §§ 11:1–11:21 (5th ed. 2012) (sections on proof at trial); 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* §§ 8:6–8:13 (11th ed. 2014) (sections on "Aggregate proof" and "statistical evidence").

The Court has correctly observed that statistics "come in infinite variety" and that their "usefulness depends on all of the surrounding facts and circumstances." *Int'l Bhd. of Teamsters*, 431 U.S. at 340. Questions about the utility of statistical evidence should "be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

B. The District Court's Failure to Develop a Feasible Management Plan Does Not Require Reconsidering Precedent Governing Certification When Some Class Members Might Be Unable to Prove Liability

The Court should not fully address the second question presented, which asks whether a class or collective action "may be certified or maintained" if some claimants were "not injured." Pet. Br. i. Answering this context-sensitive question would require reconsidering settled precedent on an inadequate record. Instead, whether the case can continue as a class action or collective action should be an issue on remand. See *supra* Part I(C).

First, this issue does not involve "standing" (Pet. Br. 46) for the same reason that standing is not retroactively a concern in ordinary litigation when plaintiffs lose on the merits. For example, suppose that four employees joined donning and doffing claims under Fed. R. Civ. P. 20(a)(1), there were no class allegations, the plaintiffs survived a motion to dismiss

for failure to state a claim, and at trial three plaintiffs prevailed and one lost. The Court would not treat the losing plaintiff as lacking "standing"; he simply failed to prove a claim. See *Bond* v. *United States*, 131 S. Ct. 2355, 2362 (2011) (observing that "conflation" of merits and justiciability issues "can cause confusion"). Likewise, "standing" is not the relevant inquiry when class actions identify some claims as meritorious and some as meritless because Rule 23 is, like Rule 20, a "species" of "traditional joinder." *Shady Grove*, 559 U.S. at 408 (plurality opinion).

Second, Rule 23's text expressly contemplates that "questions affecting only individual" class members may cause some to lose while others prevail. Fed. R. Civ. P. 23(b)(3). The prospect that some class members' claims will lack merit requires careful case management but does not categorically preclude certification. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate."); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997) (requiring "caution" rather than a categorical bar when "disparities among class members [are] great"). If there is confusion about this point, evolving doctrine addressing "ascertainability" will present more direct opportunities to address the issue.[26]

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[26] *Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 161–71 (3d Cir. 2015) (collecting cases). Amici express no view about whether "ascertainability" is a sensible concept or how it should apply.

Third, the critical problem below was that the District Court improperly managed the trial by failing to account for factual variations among class members. The judge who certified the class found that "dissimilarities" existed but believed they would be "manageable." Pet. App. 90a. That judge never had an opportunity to manage variations because the case was transferred to another district. Pet. App. 5a. The transferee court did not adapt as the case evolved.

District Courts managing aggregate litigation must make decisions "informed by the proceedings as they unfold." *Amchem*, 521 U.S. at 620. Here, the court overlooked mounting evidence that a classwide judgment would be premature. After Mericle and Fox testified, the District Court should have realized that plaintiffs: (1) had not proved classwide liability; and (2) had no plan for a post-trial claims resolution process. The court should have anticipated these problems before the trial, but in any event was required to react when the problems arose. By failing to adjust as the class action unraveled, the District Court overlooked its "unique responsibilit[y]" to provide "active judicial management" in aggregate proceedings. *Manual for Complex Litigation, Fourth*, § 21.

The District Court's error presents an opportunity for this Court to provide guidance about case management. At early stages of litigation some courts "overestimate their ability to cope with the burdens that class actions impose." Erbsen, 58 Vand. L. Rev. at 1046. Certification then "creates momentum that courts may be unwilling to halt." *Id.* at 1047. Requiring a "feasible" plan can help courts make a

"realistic assessment of how a case can be litigated" before they go too far down an unproductive path. *Id.* at 1046–48. Courts should therefore develop an "adjudication plan" addressing both "common" and "remaining" issues. ALI *Principles* § 2.12(a)(3). Planning can avoid ill-considered "shortcuts" that attempt "to squeeze heterogeneous claims into a homogenous mold" in order to manage "dissimilarity" among class members. Erbsen, 58 Vand. L. Rev. at 1009.

Careful planning in this case might have led to a more refined presentation of evidence. Alternatively, if planning revealed that aggregation was not feasible, the court and parties would have been spared the expense of trial.

Finally, this case is an anachronism. It was certified before *Wal-Mart* redefined commonality, and it was tried before *Comcast* reconsidered statistical evidence and *Sandifer* reinterpreted the FLSA. Settled precedent requires vacating a classwide judgment based on a poorly constructed time study that glossed over material variations among individual claims. A new opinion might clarify the importance of fidelity to substantive law and the need for feasible management plans. Any additional issues should await future cases with appropriate records.

CONCLUSION

Jurisprudence governing aggregation should be sensitive to the diverse contexts in which it operates. Vacating the classwide judgment on narrow grounds would recognize the fact-bound nature of the errors below, provide guidance that could avoid similar errors in the future, and preserve flexibility to employ aggregative procedures in cases where they are fair and efficient.

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August 14, 2015

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents

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September 29, 2015

QUESTIONS PRESENTED

The petition for certiorari sets out the following two questions:

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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INTEREST OF AMICI CURIAE

The *amici* are law professors who teach and write in the field of federal civil procedure and complex litigation. Amici share an interest in presenting this Court with an impartial view as to the appropriate doctrinal framework governing the first question presented in this case.[1] The complete list of signatories is as follows:

Sergio J. Campos, Associate Professor of Law, University of Miami School of Law;

Suzette M. Malveaux, Professor of Law, The Catholic University of America, Columbus School of Law;

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' letters of consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

As interested professors of the law of complex litigation, we submit this amici curiae brief because we are concerned that the petitioner seeks an unnecessarily broad decision that would bar "statistical techniques" long used in a wide variety of complex cases. Even though the wording of the question presented suggests otherwise, actuarial and other "statistical techniques" in class actions often do not "presume" all class members are "identical to the average." Parties may introduce relevant and reliable statistical evidence, as well as other forms of aggregate proof, to resolve issues of liability and damages accurately, efficiently and consistently. In addition, parties can do so while leaving individual defenses for another day. Like other amici curiae, we accordingly urge the Court to refrain from adopting an interpretation of Rule 23 that would prohibit or undermine such appropriate uses of statistics and similar aggregate proof in class actions. *See* Brief of Civil Procedure Scholars as Amici Curiae in Support of Neither Party at 5; Brief of Amici Curiae Civil Professors in Support of Respondents at 10-13.

We submit this separate brief because we believe that the precise problem Tyson raises could have been avoided through well-accepted trial procedures that the petitioner opposed or ignored at trial. In many different kinds of litigation, district courts permit parties to use statistics, aggregate proof, and other evidentiary inferences to resolve recurring questions in complex litigation while protecting a party's right to assert individual defenses. Among other ways, they can do so by *bifurcating* the class action into two phases: (1) a "common issue" phase

which resolves issues that are the same, or common, to all of the class members, and (2) an "individual issue" phase which allows the court to resolve issues unique to individual class members.

In fact, in the present case, it appears that the respondents proposed bifurcation of common and individual issues, but Tyson itself successfully opposed such bifurcation, and offered no alternative method of preserving its individual defenses. Tyson cannot now claim that "statistical techniques," including the aggregate proof offered here, undermine a right to a day in court, including its own right to assert individual defenses, when it blocked a common and well-accepted means of protecting that right, and failed to avail itself of similar practices. As set forth below, the Court should decline the petitioner's invitation to articulate categorical rules barring actuarial tools that have long been used in complex cases.

ARGUMENT

I. STATISTICAL TECHNIQUES AND SIMILAR FORMS OF AGGREGATE PROOF HAVE MANY APPROPRIATE USES IN CLASS ACTIONS.

In general, statistical techniques can be used to determine, "to specified levels of accuracy, characteristics of a 'population' or 'universe' of events, transactions, attitudes, or opinions by observing those characteristics in a relatively small segment, or sample, of the population." *Manual of Complex Litigation (Fourth)* § 11.493, at 102 (2004). Because, by definition, a class action involves a class

"so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), statistical techniques can be, and have been, an efficient means of determining information about the large population of class members.

As we show in this part, in a wide variety of situations parties may use statistics, as well as other forms of aggregate proof, to resolve common questions of liability and individual issues of damages accurately and efficiently. As set forth in Part II, courts may do so, while protecting a defendant's right to raise individualized defenses for each class member, through bifurcation and similar well-accepted trial practices. The petitioner, in fact, rejected or ignored all of these practices here.

A. Statistical techniques can be used to determine issues of liability that are common to the class.

To certify a class action in federal court, one must first satisfy the requirements of "numerosity, commonality, typicality, and adequacy of representation." Fed. R. Civ. P. 23(a)(1)-(4); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Class actions involving damage claims, like the class action in this case, are typically governed by Rule 23(b)(3), which further requires a court to find that issues common to the class "predominate" over individual issues and that the class action is "superior" to other procedures. Fed. R. Civ. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2558.

Statistical techniques and similar approaches that rely upon a sample are an appropriate way to

determine common issues of liability in a variety of settings, including antitrust, securities fraud, and employment discrimination litigation. In all of these settings statistical techniques have been especially useful at the class certification stage to determine whether the predominance requirement of Rule 23(b)(3) has been satisfied.

Antitrust. Statistical techniques have long been accepted in antitrust class actions. Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 18:45 (4th ed. 2002); *see also Manual of Complex Litigation (Fourth)* § 23.1, at 470-71 (2004) ("Statistical evidence is routinely introduced and explained by experts in antitrust litigation. "). For example, Section 1 of the Sherman Act prohibits "[e]very contract, combination ., or conspiracy, in restraint of trade." 15 U.S.C. § 1. Similarly, Section 2 of the Sherman Act prohibits any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." 15 U.S.C. § 2. To satisfy the predominance requirement for both Section 1 and Section 2 claims, courts have required, among other things, a showing that the impact of the alleged conspiracy is common to the class. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (discussing Section 1 claims); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013) (discussing Section 1 and Section 2 claims).

Courts have routinely permitted the use of statistics and other inferential aggregate proof to show that an alleged antitrust violation raised prices

relative to the prices found in a competitive market, thus establishing impact. *See, e.g., In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (noting that the plaintiff's expert provided a statistical model that "followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class."); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 808 (7th Cir. 2012) (concluding that the plaintiffs use of "the same economic and statistical methods used by the Federal Trade Commission staff and Northshore's own economic experts to analyze antitrust impact" was sufficient to establish antitrust impact for purposes of the predominance requirement).

Moreover, proof of antitrust impact on a market requires a comparison between the actual world and the competitive world that would have existed "but for" the alleged antitrust violation. 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 392a (3d ed. 2007). Because of the "inherent difficulty" of actually observing the counterfactual, "but for" world of competition, parties must rely upon statistics and other inferential, aggregate approaches like economic modeling to infer the characteristics of such a world based on observations in comparative markets. *See, e.g., Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013); *In re Steel Antitrust Litig.*, 2015 WL 5304629, at *9 (N.D. Ill. Sept. 9, 2015) (same, citing *Behrend v. Comcast Corp.*). Accordingly, the use of statistical techniques and similar aggregate proof to establish

antitrust impact is not only useful, but it is "the only practicable means to collect and present relevant data." *Manual of Complex Litigation (Fourth)* § 11.493, at 102 (2004); *see also Comcast*, 133 S. Ct. at 1433 (recognizing the need for modeling, and noting that, in the antitrust context, "[c]alculations need not be exact," *citing Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

Securities Fraud. Statistical techniques and similar aggregate proof have also been appropriately used to establish common issues in securities fraud litigation. Federal securities laws prohibit sellers of publicly traded securities from making an "untrue statement of a material fact" to defraud investors. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (citing 15 U.S.C. § 78j(b) & 17 C.F.R. § 240.10b–5 (2004)). Federal courts have permitted investors to bring a private right of action to enforce this prohibition. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (*citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)). Such a claim requires an investor to prove "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013) (*quoting Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1317 (2011)).

As this Court has recently recognized, both materiality and loss causation are issues common to the class. *See Amgen*, 133 S. Ct. at 1191 (materiality); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) ("Loss causation . requires a plaintiff to show that a misrepresentation that affected the integrity of the market price also caused a subsequent economic loss"). To prove that an alleged fraudulent statement caused a loss and its magnitude, plaintiffs typically rely upon event studies, which identify a particular event like a fraudulent statement and use statistical and economic methods to determine whether that event affected the price of a stock absent other causes. *See* David Tabak & Frederick Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, in Litigation Services Handbook, The Role of the Financial Expert ch. 19 (3d ed. 2001); *see also* Sanjai Bhagat & Roberta Romano, *Event Studies and the Law, Part I*, 4 Am. L. & Econ. Rev. 141, 142-45 (2002); Jonathan R. Macey, Geoffrey P. Miller, Mark L. Mitchell & Jeffry M. Netter, *Lessons From Financial Economics: Materiality Reliance, and Extending the Reach of* Basic v. Levinson, 77 Va. L. Rev. 1017, 1025-42 (1991); *see also Halliburton*, 134 S. Ct. at 2415 (defining "event studies" as "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events.").

Accordingly, statistical methods like event studies have long been accepted at the class certification stage to establish, or disprove, predominance. *Halliburton*, 134 S. Ct. at 2415-16 (permitting a defendant to submit evidence of "price impact" based

on event studies to rebut fraud on the market presumption of reliance).

Employment Discrimination. Courts have also used statistical methods in employment discrimination cases under Title VII. Statistical models are readily accepted to establish whether a pattern or practice has a "disparate impact" on a protected group in violation of Title VII. Indeed, any claim of disparate impact requires "reliable statistical evidence showing that a particular employment practice has a disparate impact on a protected class." *E.E.O.C. v. Freeman*, 2015 WL 5178420, at *3 (D. Md. Sept. 5, 2015); *see also Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000) ("Claims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof."), *citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)).

Similarly, for disparate treatment cases, "[a]ppropriate statistical data showing an employer's pattern of conduct toward a protected class as a group, can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)). *cf. Wal-Mart*, 131 S. Ct. at 2553-54 (concluding that statistical and sociological aggregate evidence was insufficient to establish discriminatory intent for purposes of commonality).

B. Statistical techniques can also facilitate the determination of individual issues.

Statistical techniques can also be used to facilitate the determination of issues unique to each individual. First, statistical techniques can be used to sequence the resolution of individual issues so that the court and the parties efficiently use resources. For example, random sampling can be used to pick individual cases whose damage determinations will help other parties assess their claims and facilitate settlement. *Manual of Complex Litigation (Fourth)* § 22.316, at 360 (2004); Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 577-78 (2008); Eldon E. Fallon, *et. al.*, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2342 (2008). Such "bellwether trials" are typically used in multidistrict litigation or litigation that is otherwise consolidated before a single court. *See* Duke Law Center for Judicial Studies, *MDL Standards and Best Protocols* 18-20 (2014), *available at* https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf; Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2061-62 (2012). However, bellwether trials can be, and are, used in class actions to facilitate settlement. *See, e.g.*, *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 607 Fed. Appx. 203, 205 (3d Cir. 2015) (discussing the use of a bellwether trial for damages for class action certified as to common issues only).

Second, statistical techniques and similar aggregate proof can be used to develop a mechanical

formula that allows the class members to recover in an efficient manner. Examples can be found in class actions involving antitrust and securities fraud claims. *See* 6 Newberg & Conte, *supra* § 18.53, at 175-76 (noting that the "application of mechanical formulae or statistical methods to individual claims, has received approval in antitrust cases"); 7 *id.* § 22.65, at 303-04 ("Determination of damages sustained by individual class members in securities class action suits is often a mechanical task involving the administration of a formula."); *see also In re Polyurethane Foam Antitrust Litig.*, 2014 WL 6461355, at *67 (N.D. Ohio Nov. 17, 2014) (certifying antitrust class action, noting that the plaintiffs proposed "a workable damages methodology" using "Direct and Indirect Purchaser regressions").

Third, statistical techniques can be a valuable and efficient way to establish the aggregate damages owed by the defendant. By doing so, the court can ensure that the defendant does not avoid its liability, thereby preventing "unjust enrichment." 6 Newberg & Conte, *supra* § 18.53, at 174-75 (noting, in the antitrust context, that aggregate damages "may prove to be extremely equitable inasmuch as the amount of damages arrived at is likely to correspond to the total injury inflicted by defendant or the extent of its unjust enrichment") (quotation omitted).

Statistical models are still subject to Federal Rule of Evidence 702, which requires courts to ensure that expert evidence "fits" the plaintiff's legal theory. *See Comcast*, 133 S. Ct. at 1435 ("The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic

impact of that event," citing Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011)); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Parties can also challenge a judge's clearly erroneous decision to admit expert testimony. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997). Such questions involve whether plaintiffs offered "relevant" and "reliable" expert testimony to meet the elements of their case. But questions of evidentiary "fit" are not raised by the first question presented here, which only concerns the use of these methods in class actions, not their sufficiency in this case.

II. WELL-ACCEPTED TRIAL PRACTICES CAN PERMIT THE USE OF STATISTICAL TECHNIQUES WHILE PRESERVING A DEFENDANT'S RIGHT TO ASSERT INDIVIDUAL DEFENSES.

Statistical and similar aggregate evidence remain useful even when the kinds of individual questions asserted by Tyson here remain. Well-accepted trial practices, such as bifurcation, permit courts to materially advance litigation using aggregate forms of proof while protecting the defendant's right to assert individualized defenses.

A. Individual defenses can be asserted through bifurcation and similar trial practices.

This Court has previously expressed concern that the use of statistics in Rule 23 class actions in the form of a "Trial By Formula" may "deprive" a defendant's right to assert individual defenses in

violation of the Due Process Clause, or otherwise "abridge" such a right under the Rules Enabling Act. *Wal-Mart*, 131 S. Ct. at 2561 (citing U.S. Const. amend. v, xiv & 28 U.S.C. § 2072(b)). Tyson argues that the use of statistical techniques here violated the Due Process Clause and the Rules Enabling Act for the same reason. Specifically, it contends that the statistical techniques permitted by the district court prevented Tyson from asserting individual defenses against specific class members. Petitioner's Br. at 36.

However, *Wal-Mart* does not stand for the proposition that all statistical techniques and similar methods of aggregate proof in class actions violate the Due Process Clause and the Rules Enabling Act. For years, courts appropriately have used statistical evidence while protecting defendants' right to assert individualized defenses.

One method that district courts have used is bifurcating issues that are the same, or common, to each class member from issues that are unique for each individual class member. Bifurcation of common issues from individual issues "insulates a party from the possible prejudice of jointly trying certain issues." William B. Rubenstein, 4 *Newberg on Class Actions* § 11:4, at 13 (5th ed. 2014). Given this benefit, it is no surprise that bifurcation is generally accepted in a wide variety of contexts. *See, e.g.*, *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004) (Equal Credit Opportunity Act); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001) (Labor-Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564–566 (6th Cir. 2007) (Federal

Communications Act); *see also* 4 Rubenstein, *supra* § 11:4, at 15 (noting that "trial bifurcation is widely accepted").

Along with "(1) bifurcating liability and damage trials," a court may also protect individual issues by "(2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayor, J.), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (noting some of these possibilities, citing *In re Visa Check*).

Accordingly, Tyson simply misses the mark when it objects to class certification based on issues like "whether Tyson's system for compensating employees for these activities failed to compensate the employee for all of the overtime he or she worked." Petitioner's Br. at 29. Given the availability of these trial practices to cordon off individual issues, including individual defenses, from common issues, "[i]n the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J., dissenting) (noting that "[r]ecognition that individual damages calculations do not preclude class

certification under Rule 23(b)(3) is well nigh universal," *citing* 2 Rubenstein, *supra* § 4:54, at 208); *see also* Elizabeth C. Burch, *Constructing Issue Class Actions*, 102 Va. L. Rev. ---, 32-33 (forthcoming 2016) ("[C]ourts have properly separated eligibility components such as plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental contamination, and consumer-fraud litigation.") (collecting cases), *available* at http://ssrn.com/abstract=2600219.

Moreover, bifurcation and similar trial practices would not result in a "Trial by Formula." In *Wal-Mart Stores, Inc. v. Dukes*, this Court rejected a trial plan in which "[a] sample set of the class members would be selected, as to whom liability" would be assessed, and then "the number of (presumptively) valid claims would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—*without further individualized proceedings*." 131 S. Ct. at 2561 (emphasis added).

However, trial practices like bifurcation do not require a court to apply the outcomes of a sample of cases per force to all of the cases, thereby preventing Tyson to assert an individual defense against a nonsampled plaintiff. Indeed, the whole point of trial practices like bifurcation is to preserve each party's day in court with respect to individual issues. Accordingly, by protecting individual issues from such sampling, "bifurcation is the *answer* to the problems found by" this Court in *Wal-Mart*. 4 Rubenstein, *supra* § 11:7, at 27 (emphasis in original); *see also* Sergio J. Campos, *Mass Torts and*

Due Process, 65 Vand. L. Rev. 1059, 1111 (2012) ("[A] plaintiff may still have her 'day in court' in the context of a bifurcated class action with a common-issue proceeding and individual-issue determinations.").[2]

This case is, in fact, a far cry from *Wal-Mart* where statistics provided the "glue" holding together the large number of disparate claims asserted against different Wal-Mart stores. *Wal-Mart*, 131 S. Ct. at 2551-52 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Unlike in *Wal-Mart*, the plaintiffs here were all subject to the same, explicit policy regarding overtime—the "gang time" compensation system—which Tyson concedes is common to the class. *See* Petitioner's Br. at 31-32. Consequently, this case already involves a common policy, and thus does not use statistics to "presuppose[] the proposed class as a unit." Nagareda, *supra*, at 115. When plaintiffs use statistical evidence to establish the extent of liability for a single employer's past conduct, such evidence

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[2] To be clear, we do not contend that Due Process or the Rules Enabling Act *requires* bifurcation or other trial procedures in class actions that rely on such methods. *See* Brief of Amici Curiae Civil Professors in Support of Respondents (arguing that aggregate proof is consistent with substantive law and Due Process). Nor does the question presented raise this issue. But, as set forth below, Tyson cannot now complain that class certification violated due process when it did nothing to protect its right to assert individual defenses and even frustrated an accepted means of doing so.

can be used to establish classwide liability—particularly when widely-accepted trial practices exist to protect defendants' interests in contesting other issues raised in the litigation.

B. Tyson should not profit because it successfully opposed or ignored bifurcation and similar practices prior to trial.

Tyson cannot now object to the use of aggregate proof in this case when it failed to avail itself of the trial practices discussed above. Prior to trial, the plaintiffs "request[ed] that the calculation of individual amounts of backpay for each plaintiff and class member be bifurcated so that the jury trial will be limited to the issues of liability." *See* Order for Final Pretrial Conference, *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 14, 2010), *available at* Joint Appendix at 112. However, Tyson successfully opposed the proposed bifurcation. *See id.*, Joint Appendix at 115.

In addition to opposing bifurcation, Tyson also did not provide its own proposal for bifurcation, nor suggest decertifying the class as to individual issues, nor suggest a magistrate to deal with individual issues, nor suggest using subclasses, nor propose altering or amending the class. *See In re Visa Check*, 280 F.3d at 141 (discussing these possibilities). Tyson cannot now complain about due process when it obstructed or failed to avail itself of any procedure which would have protected its rights. *Cf. Espenscheid*, 705 F.3d at 775-76 (admonishing the plaintiffs for "opposing bifurcation and subclasses

and refusing to suggest a feasible alternative, including a feasible method of determining damages").

Tyson further frustrated the potential effectiveness of bifurcation and similar procedures by failing to keep individualized records of the plaintiff's "donning and doffing" times as required by law. *See* 29 U.S.C. § 211(c) ("Every employer shall make, keep, and preserve such records of the persons employed by him "). Faced with this lack of evidence as to individual donning and doffing times, the district court turned to a common use of aggregate, inferential evidence—to prevent the "unjust enrichment" of the defendant. 6 Newberg & Conte, *supra* § 18.53, at 174-75.

Indeed, the very aggregate evidence that Tyson challenges is permitted under the substantive law precisely because "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). "Any other rule would allow the wrongdoer to profit from his wrongdoing at the expense of his victim." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946) (noting that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," and that this rule "is not restricted to proof of damage in antitrust suits"). Given all of the above circumstances, Tyson received all of the process it was due.

CONCLUSION

As set forth above, the Court should decline the petitioner's invitation to articulate categorical rules barring actuarial tools that have long been used in many areas of law—particularly where the precise problem the petitioner raises can be avoided through well-accepted trial procedures.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of *amicus* briefs have been submitted to the Clerk.

CDIA has a significant interest in this case because its members face an onslaught of class litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm, CRAs have become a target of the class action bar. Many of the cases that are brought against CRAs are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

In *Spokeo, Inc. v. Robins*, No. 13-1339, this Court will decide whether a bare violation of the FCRA, without more, qualifies as an "injury in fact" allowing a plaintiff to file suit and seek statutory damages. CDIA has urged the Court to hold that an actual injury—not a mere "injury in law"—is necessary to establish Article III standing, and to qualify for damages under the statute itself. *See* Br. of CDIA as Amicus Curiae in Support of Pet'r in *Spokeo* (July 8, 2015). If the Court holds that actual harm is required, it should go without saying that any class action under the FCRA must similarly be limited to individuals who have suffered a real injury. Unfortunately, some lower courts may resist that straightforward conclusion, on the erroneous

premise that classes may be certified notwithstanding that not all class members are injured. In this case, the Court should confirm that whatever it holds in *Spokeo* applies to named plaintiffs and absent class members alike.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure is just that—a rule of procedure. It enlarges no substantive rights, eliminates no defenses, and creates no Article III Case or Controversy where none would otherwise exist. If an individual could not bring a claim or receive relief in a traditional civil action, he may not have that claim advanced on his behalf as an absent member of a class action, and he certainly may not receive a monetary award that would have been impossible outside of a class action.

The court of appeals in this case and several others have embraced a different view of the class action. Using statistical methods to ignore questions of individual injury, the court of appeals treated class actions not as a species of joinder, but as a kind of jurisprudential alchemy, conjuring claims for absent class members who outside of a class action would have none. The Court should reject that expansive view of the class action.

The second question presented—whether class members who have suffered no injury may nonetheless be included in, and recover from, a class action—is especially fundamental. In a significant group of cases, the lower courts have allowed attorneys to pursue broad, "no injury" class actions,

seeking uncapped statutory damages for alleged statutory violations without proving any harm to any plaintiff. Before this Court in *Spokeo Inc. v. Robins*, No. 13-1339, is the question of whether in such cases, a bare statutory violation is enough to qualify a plaintiff to bring suit in Article III court and collect statutory damages. The Court should hold that it does not. In this case, the Court should confirm that anything it says in *Spokeo* cannot be limited to named plaintiffs. Like any individual seeking a remedy from an Article III court, absent class members in a statutory damages action must have suffered an actual injury in fact.

1. Class actions are a method of aggregating claims; they do not alter what an individual could otherwise recover outside of class litigation. If an individual could not come to court and secure relief as a plaintiff, she cannot seek and obtain judicial relief simply by virtue of inclusion in a class.

This basic rule follows from several overlapping legal principles. Article III requires a claimant proceeding before a federal court to demonstrate a sufficient injury-in-fact, and that rule cannot be disregarded in a class action. The Rules Enabling Act prevents class actions from being used to change substantive law and abridge rights, yet that is exactly what happens when uninjured individuals, who could not recover on their own, are permitted to recover in a class action. The Due Process Clause's guarantee that defendants be afforded an opportunity to pursue every available defense similarly forbids a theory of class litigation that does not allow the defendant to probe whether individual class members actually have claims.

Finally, whereas a number of courts have viewed Rule 23 as a *substitute* for the important limitations on class actions, this Court's precedents make clear that Rule 23 must be interpreted in keeping with the constraints of Article III and the Rules Enabling Act.

Both questions presented in this case flow from the principle that an individual's recovery cannot be one thing in an individual action and another in a class action: a claimant cannot recover more damages than he is entitled because of what a statistically "average" class member experienced, and an individual who was not injured at all cannot be treated as if he has a valid claim in a class action. FCRA class actions, in which statutory damages are often sought on behalf of millions of individuals with little reason to believe many (if any) are actually injured, illustrate the absurdity of an approach that is indifferent to class member injury.

2. Some courts have justified ignoring Article III and the Rules Enabling Act at the class certification stage with vague assurances that uninjured class members will not actually recover anything. In practice, however, courts certify classes with no clear plan for how the injured will be separated from the uninjured. More fundamentally, class action attorneys understand that no realistic plan will be necessary, because once an artificially large class is certified, the pressure to settle will be impossible to resist. This outcome harms not only defendants, but also class members who are actually injured and have strong claims, as their recovery is diluted by the presence of uninjured class members.

3. This case bears a close relationship with *Spokeo v. Robins*. Although the problem of "no

injury" statutory damage class actions has been extensively briefed in *Spokeo*, the case itself does not involve a certified class. If, as CDIA has urged, this Court holds that an FCRA plaintiff must adequately allege an actual injury beyond a bare statutory violation, class action attorneys may well try to circumvent that requirement by putting forward a single injured plaintiff to represent a class for whom injury is never demonstrated. Even if this Court is able to dispose of the present case based on the first question presented, it should reach the second question to ensure that whatever it decides in *Spokeo* cannot be evaded.

ARGUMENT

I. Uninjured Individuals Who Could Not Prevail In An Individual Action May Not Recover As Absent Class Members.

Class actions are a "method[] for bringing about aggregation of claims." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008). They are akin to other procedural tools, such as joinder, consolidation, and multi-district litigation, "by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum." *Id.* Because this procedural device "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," the class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.).

If this fundamental characteristic of the class action is to be respected, every member of the class must stand to recover exactly what he could have recovered in an individual action—no less, but also no more. This was the holding in *Wal-Mart v. Dukes*, where the Court unanimously recognized that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. 2541, 2561 (2011). Whether the issue is a valid defense, a missing element of a claim, or a lack of standing to bring that claim, the overarching principle is the same: if an individual could not come to court and secure relief as a plaintiff, she cannot seek and obtain judicial relief simply by virtue of inclusion in a class.

This precept stems from several distinct but overlapping principles of law:

Article III. Federal courts have no power to adjudicate claims of individuals who did not suffer an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The Constitution's "Case or Controversy" requirement, U.S. Const. art. III, § 2, "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

An absent class member "invokes federal-court jurisdiction" and seeks relief from that court. The only difference between such a claimant and a named plaintiff is that the absent class member is permitted, by procedural rule, to have her claim aggregated with others and decided without her direct participation. But an individual's substantive entitlement to seek and receive judicial relief cannot be expanded by resort to this "species" of "joinder." *Shady Grove*, 559 U.S. at 408 (plurality op.). Accordingly, if a named plaintiff would be turned away from court for failing to show injury in fact, the result must be the same for an absent class member for whom injury cannot be established.

Some courts, however, have refused to require absent class members to satisfy Article III standing. As one court of appeals recently confirmed, this view is premised on a remarkable proposition: that "the class action device treats individuals falling within a class definition as members of a group *rather than as legally distinct persons*." *Neale v. Volvo Cars of N. Am., LLC*, __ F.3d __, No. 14-1540, 2015 WL 4466919, at *7 (3d Cir. July 22, 2015) (emphasis added). That cannot be correct. If, as this Court has recognized, a class action is simply a procedural device for aggregating individual claims, what each class member possesses is nothing more or less than her own original claim. Certification of a class does not create some new, joint claim; it merely permits efficient adjudication of existing claims.

Neale and similar decisions further err when they invoke this Court's decisions permitting a case to proceed so long as one plaintiff can establish standing. *See id.* (citing *Horne v. Flores*, 557 U.S.

433, 446 (2009) and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977)). Tellingly, these cases concern generally-applicable injunctive relief, which presents a wholly different situation from individualized monetary awards. *See Horne*, 557 U.S. at 441; *Arlington Heights*, 429 U.S. at 258. Many civil rights and similar cases for injunctive relief necessarily resolve the rights of absent parties, whether a class is certified or not. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013) (non-class action filed by "two same-sex couples who wish to marry," resulting in order "permanently enjoining the California officials named as defendants from enforcing [Proposition 8]"). It makes no difference in such cases whether particular absent individuals are included in the class or not, because there are no individualized issues to be adjudicated or relief to be awarded. As this Court has recognized in distinguishing Rules 23(b)(2) and (b)(3), a mechanism for awarding "indivisible" injunctive relief is very different from one in which individualized monetary awards are sought. *Wal-Mart*, 131 S. Ct. at 2557-59. There is no support for the notion that an individual may proceed in federal court on a personal monetary claim without standing, whether in a class action or otherwise.

Rules Enabling Act. The same result follows from the Rules Enabling Act. As a rule of procedure, Rule 23 "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). But an absent class member's substantive rights are indeed enlarged—and the defendant's abridged—if

she is allowed relief in a class action that she could not secure in an individual action.

This principle was the basis of the Court's rejection of "Trial by Formula" in *Wal-Mart*. 131 S. Ct. at 2561. *Wal-Mart* involved claims of employment discrimination, and as a matter of substantive law, the defendant should have been entitled to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977)). But instead, the Ninth Circuit authorized a class action in which the claims and defenses of "[a] sample set of the class members" would be litigated, and "the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery." *Id.* This, the Court held, violated the Rules Enabling Act, which forecloses a class from being "certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id.*

The same is true here. In traditional litigation, an individual who suffered no harm from the challenged conduct could not secure judicial relief. A class action cannot, by use of statistics or otherwise, be certified on the premise that uninjured individuals can litigate claims and be awarded relief.

Due Process. Allowing uninjured individuals to be included in a class would similarly violate the Due Process Clause, which "requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

As Justice Scalia has observed, it is constitutionally problematic when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

Rule 23. Finally, Rule 23 itself precludes a class action in which a putatively injured plaintiff represents *uninjured* class members. As this Court has held, "a class representative must be part of the class and possess the same interest and *suffer the same injury* as the class members." *Wal-Mart*, 131 S. Ct. at 2550 (emphasis added) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Where members of the class suffer no injury from the challenged conduct, the class cannot be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Indeed, inclusion of uninjured class members in a class is a recipe for conflicting interests, as class members who *are* injured face dilution of their ultimate recovery. *See infra* at 15-16.

Some courts have suggested that fundamental questions of class member standing can be ignored in favor of "[f]ocusing on certification questions." *Neale*, 2015 WL 4466919, at *11. As discussed below, assurances that "certification questions" will exclude uninjured members often prove to be empty in practice. But this approach also misunderstands this Court's precedents. Far from permitting courts to rely on a loose view of Rule 23 as a substitute for compliance with Article III and the Rules Enabling

Act, the Court has instructed that "Rule 23's requirements must be interpreted *in keeping with* Article III constraints, and with the Rules Enabling Act." *Amchem*, 521 U.S. at 613 (emphasis added).

* * *

Each of these legal principles—embodied in Article III, the Rules Enabling Act, the Due Process Clause, and Rule 23—establishes that an individual cannot be included in a class seeking relief that he could not have requested or received proceeding alone. The answer to both questions presented in this case flows directly from this rule. A class member who suffered limited damages, and whose recovery would be constrained by those actual damages in an individual action, cannot be entitled to a greater judgment simply because a class action is certified and "average" damages are calculated and awarded. Even more fundamentally, an individual who was not injured at all, and thus would not have had standing to obtain *any* relief in an individual action, cannot be treated as if he has a valid legal claim through inclusion in a class action.

The experience of CRAs illustrates the practical absurdity of the view that only named plaintiffs need establish standing. To facilitate the operation of a consumer reporting system on which "[t]he banking system is dependent," 15 U.S.C. § 1681(a)(1), (2), CRAs in the United States maintain files concerning more than 200 million adults, and each month receive information on more than 1.3 billion "trade lines" (an industry term for accounts that are included in a credit report). Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 3

(Dec. 2012), *available at* http://tinyurl.com/CFPB-CRA. As a result, when CRAs are sued for (often technical) violations of the FCRA, the putative classes can number into the "millions," *see, e.g.*, Br. for Pet'r in *Spokeo* at 33-34 (July 2, 2015), or even include most of the adult population of the United States. *See, e.g.*, *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from the denial of certiorari) (noting a "series of class actions brought under the FCRA" against Trans Union LLC, "allegedly on behalf of the 190 million individuals in [its] database").

The fact that class action attorneys can identify a handful of plaintiffs who have suffered an injury in fact says nothing relevant about whether *millions* of absent individuals have a basis to have claims heard in Article III court. Indeed, errors in individual credit reports can have differential effects, and frequently *no* effects, on ultimate credit decisions for different consumers. *See* Br. of Trans Union LLC as Amicus Curiae Supporting Pet'r (Aug. 14, 2015). If a small group of injured plaintiffs brings an FCRA class action, the question of injury for millions of absent class members cannot be assumed or deemed irrelevant.

II. Allowing Class Certification To Ignore Class Member Standing Vitiates Important Protections Against Abusive Class Actions.

Some courts of appeals have disregarded this Court's instruction that class certification requirements must be construed "in keeping with" Article III and the Rules Enabling Act, *Amchem*, 521

U.S. at 613, offering instead only vague assurances that uninjured individuals will not actually *recover* unwarranted monetary relief. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 31-32 (1st Cir. 2015); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 856 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198-1201 (10th Cir. 2010); *Kohen v. Pac. Inv. Mgt. Co. LLC*, 571 F.3d 672, 677-79 (7th Cir. 2009). Yet that is not what happens in practice.

Courts have endorsed shortcuts to recovery for absent class members, under which the substantive law that governs individual actions does not really apply in class actions. This Court's decision in *Comcast Corp. v. Behrend* is testament to the loose approach lower courts have taken in allowing aggregate evidence to be divorced from the substantive law governing individual claims. *See* 133 S. Ct. 1426, 1433-34 (2013). The Seventh Circuit has proposed "depos[ing] a random sample of class members to determine how many were not injured." *Kohen*, 571 F.3d at 679. In other words, Trial by Formula. Even after *Comcast*, in a case where "as many as 24,000 consumers" suffered no injury, the First Circuit decided "*sua sponte*" that the problem of uninjured class members could be solved through an unclear affidavit process, without explaining "[h]ow exactly defendants [will] exercise their acknowledged right to 'challenge individual damage claims at trial.'" *Nexium*, 777 F.3d at 32-35 (Kayatta, J., dissenting).

As a practical matter, class action attorneys have little reason to worry about proposing lawful

and workable means of separating the injured from the uninjured. In light of the "risk of '*in terrorem*' settlements that class actions entail," defendants can be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). In FCRA cases, for example, "[o]nce a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009)). Class certification is thus the end-point for the vast majority of cases. When a class is artificially inflated to include uninjured individuals, that simply increases the pressure to settle and the ultimate price of doing so.

Moreover, while enlarging the size of the class is an unalloyed good for the plaintiffs' class action attorney who stands to collect fees, it is not so positive for those class members who *are* injured. Emboldened by decisions allowing recovery of statutory damages without proof of harm,[2] attorneys have been willing to "forego actual damages to seek

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[2] *But see* Br. for Pet'r in *Spokeo* at 53-56; *Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam) (noting that "[a] reasonable reading of the [FCRA] could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award").

only statutory damages" in order to ease class certification. *White v. E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006). When the claims of the injured and uninjured are litigated together, those with the strongest claims—*i.e.*, those who suffered an Article III injury—are likely to see their recovery diluted.

III. The Court Should Make Clear That The Standing Requirement At Issue In *Spokeo* Applies To Every Class Member.

This case, and the second question presented in particular, bears a close relationship to another case pending before the Court this Term. In *Spokeo*, the Court is considering whether allegation of a bare statutory violation, without any concrete harm, is sufficient to satisfy the "injury in fact" requirement. Br. for Pet'r in *Spokeo* at i. CDIA in that case explained that, in addition to contravening this Court's standing precedents, allowing "injury in law" claims exposes FCRA defendants to abusive class actions. Br. of CDIA as Amicus Curiae in *Spokeo* at 22-24.

The second question presented in this case is a critical complement to *Spokeo*. Although the issue of "no injury" class actions has been extensively briefed in *Spokeo*, *see, e.g.*, Br. for Pet'r in *Spokeo* at 32-35; Br. of the Chamber of Commerce of the United States of America et al. as Amici Curiae in *Spokeo* at 12-26 (July 9, 2015), no class has yet been certified in that case. If the Court in *Spokeo* holds that an FCRA plaintiff is required to suffer actual injury beyond an "injury in law," it is not hard to envision how enterprising class action attorneys might seek to

circumvent that ruling. Pointing to the court of appeals decisions that find Article III standing inapplicable to absent class members, named plaintiffs with genuine injuries may be put forward to represent exactly the same type of "no injury" classes that prevailed pre-*Spokeo*.

The facts of *Spokeo* illustrate the dangers of this outcome. In that case, the plaintiff has charged that publication of *favorable* information about him "injured his employment prospects," on the apparent theory that it caused employers to view him as overqualified. Resp.'s Br. in Opp'n to Cert. in *Spokeo* at 3 (Aug. 6, 2014). The actual allegations supporting this (and any other) theory of injury are "sparse," *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014), and rely too much on "speculation about the decisions of independent actors" to satisfy Article III. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013). But it is conceivable that some other plaintiff could actually establish that he was denied a job, or suffered some other concrete harm, because of the conduct complained of in *Spokeo*.

The question, then, would be what this highly individualized showing means for the millions of others in a putative class that is not carefully tailored to reach individuals who have actually suffered a particular injury. Can the claims of this large group stand or fall on the idiosyncratic facts of a handful of plaintiffs who happen to bring suit? Article III, the Rules Enabling Act, the Due Process Clause, and Rule 23 all dictate that the answer is no. Yet if this Court does not correct the misimpression in the lower courts that standing requirements do not apply to every class member, the injury of a

single individual may become the basis for adjudicating—in reality, settling—the claims of millions who may well be uninjured.

If that is the result, any decision in *Spokeo* that a bare statutory violation is not an "injury in fact" would be a pyrrhic victory for constitutional standing principles. Even if the Court concludes that the Eighth Circuit's decision in this case is reversible based solely on the use of statistics to effect a Trial by Formula, the Court should also address the second question to ensure that whatever it decides in *Spokeo* cannot be evaded.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

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TYSON FOODS, INC.,

Petitioner,

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE DOW CHEMICAL COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE DOW CHEMICAL COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae The Dow Chemical Company ("Dow") is a publicly traded company based in Midland, Michigan that has been in business for more than 117 years. It operates a diverse group of specialty chemical, advanced materials, agro-sciences and plastics businesses serving customers in more than 180 countries. Dow has approximately 200 manufacturing sites in 35 countries and 52,000 employees.[1]

The Court in this case will address two questions concerning the propriety of Rule 23(b)(3) class actions that are important to all U.S. businesses, which are frequent targets of class-action lawsuits. But beyond Dow's general interest in the proper application of Rule 23, Dow has a special interest in how the Court answers the questions presented here because they overlap with the questions Dow has asked this Court to review in *Dow Chemical Co.* v. *Industrial Polymers, Inc.*, No. 14-1091 (petition for certiorari filed Mar. 9, 2015), which this Court appears to be holding pending resolution of *Tyson Foods*. The ques-

[1] In accordance with Rule 37.6, Dow affirms that no counsel for a party authored this amicus brief in whole or in part and that no person other than Dow and its counsel has made any monetary contribution to fund the preparation or submission of this brief. Counsel of record in Dow's petition, No. 14-1091, is also counsel of record in *Tyson Foods*, but has not participated in the preparation of this amicus brief. The parties' blanket consents to the filing of amicus briefs have been filed with the Clerk's office.

tions Dow has asked this Court to resolve in No. 14-1091, so far as relevant here, are:

Whether, in certifying a class under Rule 23(b)(3), courts may presume class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges; and

Whether a class may be certified where plaintiffs' common "proof" of damages is an expert's model that does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers.

Dow v. *Industrial Polymers* is an antitrust case involving allegations by industrial purchasers of various chemicals that Dow and other manufacturers agreed to issue coordinated list price announcements for certain products and then tried to make those prices "stick" in individual negotiations. A class was certified, the class action was tried to a jury, and a $1.1 billion treble-damages judgment was entered and subsequently affirmed by the Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014).

Dow asserted throughout that litigation that the case is inappropriate for class resolution under Rule 23(b)(3) because common issues do not predominate. The actual prices purchasers paid were set not by list price announcements but through robust individualized price negotiations. Class members—which included many sophisticated corporations with great buying power—frequently negotiated away any price increase, or avoided any increase by moving their

business. In consequence, many purchasers were not injured at all. Others paid widely different price increases. Identifying which purchasers were harmed, and by how much, could only be accomplished through individualized inquiry of each of the 2400 members of the class—something that was precluded by the trial of the case as a class action.

The only way plaintiffs and the courts below were able to make common issues appear predominant in Dow's case was by using illegitimate shortcuts and approximations that papered over enormous variations among class members. First, the Tenth Circuit presumed that all class members were injured by coordinated list price announcements, although the evidence showed that this was not the case. Second, it permitted plaintiffs to prove aggregate damages using an expert's model that submerged large disparities among class members with varying degrees of injury or no injury at all by extrapolating overcharges from a small sample to the rest of the class.

The certification in Dow's case of a class action that encompassed many uninjured class members, as well as the use of a damages model that ignored individual differences among class members, squarely implicate the questions presented in *Tyson Foods*. Dow believes that its experience as one of the rare defendants to litigate an antitrust class action through trial and appeal sheds a strong light on the ways in which class actions in which many class members "avoid[ed] injury altogether" (768 F.3d at 1254), and in which courts use aggregate damages models that fail to account for disparate circumstances, violate Rule 23 criteria and abridge the rights of defendants to assert defenses to individual

claims, in violation of Due Process and the Rules Enabling Act.

Whether in employment, antitrust, product liability, or other cases, this Court should not allow reflexive certification of classes that contain a substantial number of members who suffered no injury. Nor should the Court countenance class-action judgments where damages are "proved" formulaically by extrapolation from unrepresentative samples and then awarded to disparately injured and completely uninjured class members. Dow accordingly submits this brief in support of petitioner Tyson Foods.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should vacate the judgment in this case because it should never have been tried as a class action. It is far from meeting the "stringent requirements" of Rule 23 that "exclude most claims" from class treatment. *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). Because it involves "significant questions, not only of damages but of liability and defenses of liability," which affect "individuals in different ways," it was "not appropriate for a class action." Rule 23(b)(3) 1966 Adv. Comm. Notes.

The courts below held this case suitable for class adjudication only by glossing over substantial, highly individualized issues central to plaintiffs' overtime claims—namely, that class members had different jobs, and wore different clothes and used different equipment that took different amounts of time to don, doff, and clean. Furthermore, many employees were already fully compensated for donning, doffing, and washing time through Tyson's overtime policy,

and many others were fully compensated because these activities occurred during their shift time. So many class members had no injury at all.

Those facts, which were documented by the testimony of plaintiffs at trial, mean that class certification under Rule 23(b)(3) should have been denied. Claims are not sufficiently homogeneous to justify class resolution where many class members suffered no injury and lacked standing. Nor is a class sufficiently coherent when substantial and ubiquitous differences among class members would require countless mini-trials to resolve questions of injury and damages. In those circumstances individual issues inevitably predominate at trial. Because individual resolution is impossible in the class action format, class trials of such disparate claims violate a defendant's Due Process right to present every defense, as well as the Rules Enabling Act prohibition on procedural devices altering the substantive rights of the litigants.

This Court has made clear that class certification is improper unless "the existence of individual injury" is "capable of proof at trial through evidence that [is] common to the class rather than individual to its members." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1430 (2013). The courts below improperly permitted plaintiffs to manufacture common evidence of injury and damages using an expert methodology that relied on the calculation of "averages" that overrode substantial individual differences in circumstances, including the lack of any injury and divergent donning, doffing, and washing times.

ARGUMENT

CLASS CERTIFICATION IN THIS CASE CONTRADICTS THIS COURT'S RULE 23 PRECEDENTS AND VIOLATES DUE PROCESS AND THE RULES ENABLING ACT

A. The Eighth Circuit Improperly Substituted Labels And Generalizations For Rigorous Analysis Of Whether The Rule 23 Requirements Were Satisfied.

This Court has often observed that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011). It has emphasized that Rule 23 imposes "stringent requirements" for certification of a case as a class action—requirements that "exclude most claims." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). And the requirement at issue here—that common questions "predominate over any questions affecting only individual members" (Rule 23(b)(3))—is particularly stringent and "far more demanding" than the Rule 23(a) commonality requirement. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623-624 (1997).

The courts below paid lip service to these principles, but like all too many lower courts they failed to apply Rule 23 with any rigor. The district court certified, and the Eighth Circuit affirmed, a class action by 3000-plus current and former hourly workers at a Tyson Foods pork-processing plant who alleged that they were due overtime pay, or additional overtime pay, for time spent donning and doffing safety equipment and cleaning that equipment. The lower courts approved that class action even though the

claimants worked in two distinct areas of Tyson's plant, "kill" and "fabrication"; even though, within those areas, workers with some 420 different jobs wore different clothing and used different equipment; and even though Tyson already made overtime ("K-Code") payments for pre- and post-shift donning, doffing, and washing where, according to Tyson's studies, these actions occurred. Because many class members received those overtime payments, and because many others spent no out-of-shift time donning, doffing, or cleaning equipment, many class members had no injury at all. Pet. 4-5; Pet. App. 115a.

These substantial and pervasive differences among class members went directly to the core issue of plaintiffs' claims: was each employee properly compensated for time spent donning, doffing, and washing? That should have been enough to deny class certification, because these key differences "ha[d] everything to do with the issue of predominance at the class certification stage." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416 (2014). They meant that questions of liability for overtime payments and any damages due were not "capable of classwide resolution * * * in one stroke" but could only be resolved by highly individualized inquiry of each claimant. *Wal-Mart*, 131 S. Ct. at 2551. And those individualized inquiries would predominate over common issues at any fair trial. As Judge Beam correctly explained in dissenting from the panel decision, "the differences in donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation and a myriad of other relevant factors" meant that questions of who (if anyone) was owed overtime pay and how much each person was owed could not conceiva-

bly be resolved "'in one stroke'" for every class member and were not "'capable of class-wide resolution.'" Pet. App. 23a.

Despite this Court's call for "rigorous analysis" at the class certification stage (*Comcast*, 133 S. Ct. at 1432), the Eighth Circuit majority was remarkably lax in addressing these barriers to class adjudication. The majority thought *Wal-Mart* irrelevant because "Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members." Pet. App. 8a. The majority stated that "class members worked at the same plant and used similar equipment." *Ibid.* It pointed to "average" times for donning, doffing, and cleaning of 18 minutes in the fabrication department and 21 minutes in the kill department. *Ibid.* And it dismissed the presence of many uninjured employees in the class as a matter of "small" variations in amount of damages that did not interfere with commonality or predominance. Pet. App. 9a & n.5.

Those conclusory explanations are the very opposite of rigorous analysis. Tyson's K-Code "policy" establishes the company's rules for payment of overtime but has nothing to do with the question of whether the actual experiences of claimants are sufficiently homogenous to warrant class adjudication of their claims. Statements about workers having jobs in the "same plant" and using "similar" equipment gloss over the substantial variations in jobs made evident by the undisputed record facts. And references to "average" times generalize away important individual differences, including the fact that many class members were not injured at all. In short, the majority used generalizations, averages, and empty labels in place of the rigorous analysis of Rule 23 factors

that this Court's precedents demand. Only by substituting conclusory labels for close examination of the record could the majority conclude that, "[w]hile individual plaintiffs varied in their donning and doffing routines, their complaint is not 'dominated by individual issues.'" Pet. App. 8a.

To be clear, the problem here is not that, in a largely homogenous class, Tyson was prevented from "attempt[ing] to pick off the occasional class member here or there through individualized rebuttal" at trial—something that would "not cause individual questions to predominate." *Halliburton*, 134 S. Ct. at 2412. Rather it is that (1) the class is riven with hundreds of members who suffered no injury at all because they were already compensated for donning, doffing, and washing either through K-Code payments or regular shift pay and (2) any claimants who were potentially injured had disparate experiences depending on their specific job and what clothes and equipment they used. Those are just the sorts of pervasive "[d]issimilarities within the proposed class" that "impede the generation of [the] common answers" necessary for class certification and that cause individual issues to predominate. *Wal-Mart*, 131 S. Ct. at 2551; see *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013) (such a "'fatal dissimilarity' among class members * * * would make use of the class-action device inefficient" and "unfair").

Once a class is certified, the practical realities of trial mean that such individualized differences among class members will never be examined. Discovery of class members other than the named plaintiffs is generally not permitted. See 3 William Rubenstein, *Newberg on Class Actions* § 9:16 (5th ed.

2013) ("propound[ing] discovery on each class member's individualized issues * * * would frustrate the rationale behind Rule 23's representative approach to litigation"). And no judge will extend the trial to allow inquiry into each of thousands of class members' circumstances, for that would defeat the "efficiency and economy" the class format is designed to achieve, in which the class representatives stand in for all the class's members. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974). Accordingly, once variations in the class are glossed over at the class certification stage, as they were here, the defendant has no opportunity to present individualized defenses to liability or damages as to each class member at trial. The consequence of ignoring individual variations at the class certification stage is therefore exactly what this Court forbade in *Wal-Mart*: the defendant is deprived of its right "to litigate its statutory defenses to individual claims" (131 S. Ct. at 2561), and hence of its "[d]ue process" right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

This is not the only instance in which a court has ignored pervasive individual differences among class-action claimants and thereby deprived a defendant of a fair trial. As Dow detailed in its certiorari petition (No. 14-1091), the $1.1 billion judgment in the *Urethane* antitrust litigation followed a class trial in which the varied experiences of buyers in avoiding some or all of the announced price increases—and therefore injury and damages—were hidden behind a judicial "presumption" that the price *announcements* resulted in harm, even though the prices that customers *actually paid* varied enormously and were often unaffected by the price announcements. The constraints of class discovery and trial meant that Dow

was unable to expose all those dissimilarities among class members. It was prevented from introducing the sort of "direct, more salient evidence" that "sever[ed] the link" between price announcements and the actual prices that individual purchasers paid. *Halliburton*, 134 S. Ct. at 2415-2416 (holding that defendants can rebut a presumption of price impact—at both the merits and class certification stages—with "direct, more salient evidence" showing that the alleged violations "did not actually affect * * * market price"; and "without the presumption," a "suit cannot proceed as a class action"). But the predominance of individualized questions of injury should have precluded class certification because antitrust injury, essential to liability to any claimant, could not be resolved class-wide "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

The trial in *Tyson* showed very clearly why class adjudication should never have been allowed and was hopelessly unfair. Many class members lacked injury and therefore standing. And plaintiffs' claims depended on an expert's extrapolated approximations of injury and damages.

B. A Class Full Of Uninjured Employees Should Not Have Been Certified.

Plaintiffs' damages expert Dr. Liesl Fox testified at trial that adding plaintiffs' estimated average donning-and-doffing times left 212 members of the class who still worked less than 40 hours a week and so were entitled to no overtime. Pet. 11. Many more employees, who spent less than the average time donning and doffing, would not be entitled to overtime. Indisputably, therefore, the certified class was full of members who had suffered no injury. Yet

these uninjured employees were included in the aggregate damages award.

Class certification should not have been permitted in those circumstances. The many uninjured employees would lack Article III standing to sue in their own right. See *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed"). Had these uninjured employees brought individual claims, those claims would not have survived a motion to dismiss for lack of standing. Under the Rules Enabling Act, 28 U.S.C. § 2072, the rights of uninjured employees may not be enlarged or modified merely as a result of the class action device: those employees may not maintain claims that would be dismissed if the employees were not members of a class. See *Wal-Mart*, 131 S. Ct. at 2561 (the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'"). To the contrary, as this Court held in *Amchem*, "Rule 23's requirements must be interpreted in keeping with Article III constraints." 521 U.S. at 612-613; accord *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999). In fact,"[i]n an era" of "class actions," courts "must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

Even apart from this standing defect, the predominance requirement forbids certification when many claimants are uninjured. As the D.C. Circuit correctly held in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252-253 (D.C. Cir. 2013), "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving

classwide injury in fact." See also *Lewis* v. *Casey*, 518 U.S. 343, 357-358, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established," whether in "class actions [or] other suits"). Class certification must be denied when, as here, plaintiffs cannot show with "common evidence" that "all class members suffered some injury." *Rail Freight*, 725 F.3d at 252. That is because adjudication would require countless "individual trials" to determine whether each "particular [class member] suffered harm," and those individualized injury questions would inevitably predominate over any common questions. *Ibid.*

Strict adherence to the predominance requirement is especially important when many putative class members suffered no injury. When the injured and uninjured are lumped together in a class with no opportunity for the defendant to segregate them, there is even more than the usual "risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has recognized, the "pressure to settle" is "heightened" when "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010).

C. Plaintiffs' Need To Use Extrapolated Approximations To Show Injury And Damages Demonstrates That Class Certification Was Improper.

Plaintiffs' expert Dr. Kenneth Mericle categorized various donning/doffing activities, measured the time it took a small sample of employees to perform those activities, computed an average time for each activity based on those small samples, and then

added average times for cleaning equipment to arrive at an overall average time for donning, doffing, and washing for all jobs in Processing (18 minutes) and Slaughter (21.25 minutes). Dr. Fox then assumed that all class members spent those average times donning, doffing, and washing to calculate overtime pay figures and an aggregate damages award. Pet. 7-8.

These averages, however, obscured substantial differences between individual employees, who had different jobs, wore different clothes and used different equipment for those jobs—at least 212 of whom, Dr. Fox conceded, suffered no harm at all. See Pet. 5, 11. Trial evidence from the few class members who testified confirmed these differences. Pet. 9, 16. Though Dr. Mericle conceded "a lot of variation" (Tr. 1158) and observed a wide range of different times for donning and doffing (Pet. App. 137a-138a; Pet. 16), his averaging methodology wiped out these differences. See Pet. 9-10.

Class certification is improper unless "the existence of individual injury" is "capable of proof at trial through evidence that [is] common to the class rather than individual to its members." *Comcast*, 133 S. Ct. at 1430. But evidence common to the class cannot be manufactured, as it was here, by expert methodologies that hide substantial individual differences under averages.

Courts considering certification must ask whether "significant questions, not only of damages but of liability and defenses of liability," would affect "individuals in different ways," and must thoroughly test any proffered expert theory that purports to account for those differences on a class-wide basis. Rule 23(b)(3) 1966 Adv. Comm. Notes. Averaging diver-

gent class member experiences does not pass that test. See *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (a class cannot be certified based "on an estimate of the average loss for each plaintiff"); *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (a class may not be certified if it would require the defendant "to defend against a fictional composite").

Because "actual, not presumed, conformance" with Rule 23 is "indispensable," it cannot be generated by methodologies for showing injury and damages that operate by averaging away individual differences. *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982); see *id.* at 157 (even for employees working in the same plant "there is a wide gap" between "an individual's claim" and "the existence of a class of persons who have suffered the same injury as that individual"). That is precisely the type of "Trial by Formula" held to be inadequate in *Wal-Mart* (131 S. Ct. at 2561), and the sort of "speculative" and "arbitrary * * * measuremen[t]" condemned in *Comcast*. 133 S. Ct. at 1432-1433. There is no doubt that without plaintiffs' experts' formulaic extrapolation of damages to the entire class, individual questions of injury and "individual damage calculations [would] inevitably [have] overwhelm[ed] questions common to the class." *Comcast*, 133 S. Ct. at 1433.

As a result of the shortcuts approved by the courts below, plaintiffs at no stage had to prove, and Tyson at no point had the opportunity to address on an individual basis, whether each class member was injured and by how much—the very essence of trial by formula. Drs. Mericle's and Fox's extrapolations fundamentally altered Tyson's substantive right to contest the fact and extent of injury for any individ-

ual plaintiff, in violation of Due Process and the Rules Enabling Act.

This problem also is not unique to Tyson's case. The same fatal defect occurred in Dow's antitrust class action: plaintiffs were permitted to rely on extrapolated aggregate damages, which gave a treble damages windfall to class members who suffered no injury, thus improperly increasing the total damages award against Dow. In *Dow*, the plaintiffs' expert developed models showing supposed "overcharges" for approximately 25% of the class, then extrapolated damages for the remaining 75% of class members—even though the expert had found *no* overcharges on 10% of the transactions he modeled and even though his assumption of a uniform overcharge on every transaction is flatly contradicted by the evidence that many purchasers avoided all or some of the announced increases in prices. See *Dow* Pet. 8-9 (No. 14-1091).

As in *Tyson*, the expert's formulaic extrapolation buried individual injury and damages questions that would have predominated over common questions and made class adjudication plainly improper. These sorts of "drastic simplifications" wrought by an "'economist's hypothetical model'" that does not fit record facts are not a proper basis for a billion-dollar class judgment. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 742 (1977); see also *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (refusing to credit expert study that was based on "assumptions" that were "inconsistent with record evidence"); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (refusing to credit antitrust expert's speculative testimony).

* * *

The Eighth Circuit's errors regarding the certification of the plaintiff class in this case are, unfortunately, far from unusual, as the example of Dow's *Urethane* case demonstrates. Lower courts routinely disregard this Court's direction in *Wal-Mart* and *Comcast* that Rule 23 is a limited procedural device that is not intended to expand substantive relief available to plaintiffs or abridge the rights of defendants to mount individualized defenses.

Large monetary awards in class actions like this, if allowed to stand, would have unsettling effects across industries and encourage careless class certification that would injure the economy and reduce consumer welfare. Lax certification standards harm both consumers and "innocent investors," who suffer "for the benefit of speculators and their lawyers." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). The high costs of class litigation inevitably are passed along to the public and make U.S. businesses less competitive.

Failure to reverse here would even further ratchet up the pressure on class action defendants to settle even the weakest claims. Paying a blackmail settlement would be perceived as cheaper and less risky than taking a chance on prevailing at trial, particularly where individual defenses are lost behind the class action mechanism. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); Henry Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("urgent attention" is needed for class actions,

which "have gone radically wrong" and are "likely" to "produce blackmail settlements").

Trial after class certification is already "vanishingly rare." Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). If the class judgments in cases such as *Tyson* and *Dow* survive, trials will disappear altogether and the merits of claims will never be tested. Class action defendants will succumb to the disproportionate risks of class certification (and the attendant specters of joint and several liability and potential treble damages), because they will have no confidence that the lower courts will follow this Court's precedents and no hope of getting improper class certifications rectified.

The *Tyson* case is a "Frankenstein monster posing as a class action." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974). To prevent the important teachings of *Wal-Mart*, *American Express*, and *Comcast* from becoming dead letters, this Court should reverse. In doing so it should make clear to the lower courts that they cannot rely on presumptions of class-wide injury that are contradicted by the evidence, and that plaintiffs have the burden to put forward a damages measure that reflects actual damages to all or nearly all class members and may not rely on speculative theories of injury and damages that are based on averages and unrepresentative samples.

CONCLUSION

The judgment of the Eighth Circuit should be reversed. This Court should also grant certiorari in *Dow Chemical Co.* v. *Industrial Polymers, Inc.*, No.

14-1091, to allow plenary review or summary reversal.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI's members regularly must defend their clients against proposed class actions in a wide vari-

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[1] The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

ety of contexts, including the type of wage-and-hour litigation that this case exemplifies.

Too often, those proposed classes are certified even though they fail to satisfy the generally applicable requirements of Fed. R. Civ. P. 23, or the more specific requirements of statutes like the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, for adjudicating the claims of many different persons at once.[2] And once a class is certified, the stakes change dramatically, as defendants' potential exposure increases in direct proportion to the large number of claims to be adjudicated. Erroneous appellate decisions approving class certification have lasting effects on class-action defendants and their counsel, including DRI members: they increase not just the *number* of erroneous certifications, but also the *threat* of erroneous certification, and the attendant cost and settlement pressure. As cost and settlement pressure increase, there are fewer and fewer opportunities to correct those errors in class-certification law. DRI thus has a strong interest in ensuring, to the best of its ability, that erroneous class-certification decisions like the one now before the Court are corrected, and that the Court's guidance to the federal judiciary in this case prevents similar mistakes from being made in the future.

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[2] Damages class actions under Rule 23(b)(3) and collective actions under FLSA § 216(b) "are fundamentally different" in certain respects, including that persons do not become parties to collective actions unless and until they opt in by "filing written consent with the court." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529-30 (2013). Because the FLSA collective action here is a subset of the putative Rule 23(b)(3) class, the focus of this brief is on the Rule 23 class action issues.

SUMMARY OF ARGUMENT

In this case, the court of appeals held, over strong dissent, that respondents' claims under the FLSA and Iowa's state-law counterpart to it could properly proceed as a class action, to trial and eventually a seven-figure judgment in plaintiffs' favor. But that judgment was not based on any common evidence concerning how much unpaid overtime the class members are owed in the aggregate. Instead, the aggregate unpaid overtime was computed based on evidence about how much unpaid overtime the statistical "average" worker at a particular plant is owed. Much like the "reasonable person," however, the "average" worker is not a real worker, but merely a fictional construct meant to simplify the task of deciding a real case about real people. *Cf.* O.W. HOLMES, JR., THE COMMON LAW 51 (1881).

Of course, there are limits on the extent to which such devices can be usefully or fairly applied. This case demonstrates those limits. Here, the lower courts allowed respondents to rely on the power of averaging and extrapolation to dissolve critical differences distinguishing the individual claims of the various class members, including differences that resulted in many members of the class—as many as 700 out of roughly 3,000—being entitled to no overtime pay whatsoever. Had the class members sued petitioner individually, it could have answered their claims by pointing out these types of weaknesses for individual claims, thereby reducing its exposure. But instead of litigating against a class of real people asserting real claims, petitioner was forced to rebut the claims of some fictional everyman, whose "damages" were then extrapolated to the entire class. The result

may well have been more efficient than requiring individual trials with individualized proof, but it was manifestly less fair. And courts at the class-certification stage are not allowed to opt for one over the other, just as the class-action procedure is not allowed to violate defendants' substantive rights or their due-process right to present every available defense. The decisions of the lower courts in this case went far outside these bounds.

Ultimately, the lower courts' error stems from the potent appeal of resorting to averaging and statistical extrapolation as a substitute for the true commonality on which properly certified class actions depend. Averages hold out the promise of a greatly simplified proceeding, one that seemingly will generate an answer for thousands if not millions of claimants in one fell swoop with just some documents, arithmetic, and maybe an expert or two to explain it all to the judge or jury—a tempting prospect for courts confronted with purported class actions, which have a well-known tendency to prove unwieldy. But as this case shows, the problems with averages are manifold: not only do they effectively deny defendants their ability to assert real defenses, they may also allow class members with worthless claims to recover and enable plaintiffs to manipulate the amount of damages by manipulating the sample on which the average is based.

The Court took this case to decide whether statistical averaging and extrapolation techniques can obliterate differences among class members' liability and damages, including whether certain class members have been injured at all. It should answer the questions presented in the negative, by sharply circum-

scribing (if not outright prohibiting) the type of statistical "proof" that satisfied the lower courts here.[3]

ARGUMENT

I. Rule 23 Demands That Class-Certification Decisions Pay Respect To Both Efficiency And Fairness

As this Court has repeatedly instructed, class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (citation omitted); *Wal-Mart*, 131 S. Ct. at 2550 (same). Rule 23(b)(3) classes, like the state-law class that respondents requested here, are particularly exceptional, intended as "an 'adventuresome innovation,' ... for situations 'in which "class-action treatment is not as clearly called for."'" *Comcast*, 133 S. Ct. at 1432 (citations omitted). For that reason, Rule 23(b)(3) imposes additional requirements not demanded for other types of class actions—predominance and superiority—that are meant to ensure that certification will in fact "achieve economies of time, effort, and expense," but "*without* sacrificing procedural fairness." *Amchem Prods., Inc.* v.

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[3] The two questions on which this Court granted certiorari—whether classwide liability and damages may be proved by extrapolation from a statistical sample, and whether a class properly may be certified if it contains hundreds of members who were not injured—are intertwined. Lack of injury to certain class members is one important type of "[d]issimilarit[y] within the proposed class" that averaging techniques like respondents' tend to blur. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). This brief therefore largely focuses on the first question.

Windsor, 521 U.S. 591, 615 (1997) (citations omitted and emphasis added).

Efficiency thus cannot be the overriding consideration at the class-certification stage, because efficiency comes at a cost to fairness. Procedural streamlining always has its constitutional limits, and the risk that efficiency will come at the expense of fairness is heightened in class actions. *See, e.g.*, S. Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 499-500 (2012) (Ghoshray). The need to balance efficiency and fairness requires courts to "take a 'close look' at" the proposed class before certifying it. *Comcast*, 134 S. Ct. at 1432 (citation omitted).

Fairness and related notions of due process generally demand that parties be allowed an adequate opportunity to present relevant facts and circumstances bearing on the claims and defenses at issue. The American system of civil justice includes a "deep-rooted historic tradition that everyone should have his own day in court," *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (quoting C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1st ed. 1981)), that provides all parties with "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). For defendants, the same principle "requires that there be an opportunity to present every available defense." *Lindsey* v.

Normet, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)).

Efficiency, however, often requires that there be some limit placed on the volume of information the parties will be allowed to develop, lest the litigation completely exhaust their (and the court's) scarce resources. That is especially true in class actions. This Court previously has remarked on "[t]he inherent tension between representative suits and the day-in-court ideal." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 (1999). If the class comprises hundreds or thousands of members, then not all of them can practicably testify about the circumstances by which they were injured and how severe their injuries allegedly are, nor is it feasible for defendants to present individualized evidence refuting their individual claims one by one. *See* Ghoshray 498-99 (class trial "does not ... allow the defendant a reciprocal opportunity to defend against each absent class member"). And Rule 23 contemplates no such undertaking. Instead, what Rule 23 calls for is "a truly representative suit" where the claims of one or a small group of typical representatives serve as a stand-in for the claims of all the other class members. *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550 (1974). The idea is that, by proving (or failing to prove) their claims to the jury, the representatives will simultaneously establish (or fail to establish) every class member's entitlement to relief, thus conserving both the parties' and the court's resources. *See Wal-Mart*, 131 S. Ct. at 2551 (considering whether class members' claims "depend on a common contention" so that all claims "can productively be litigated at once," and "re-

solve[d]" "in one stroke"); *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) (*Yamasaki*).

This "inherent tension between representative suits and the day-in-court ideal" can be resolved, and both values accommodated, only in those exceptional cases where the class members' claims all "depend upon a common contention" that is "capable of class-wide resolution"—*i.e.*, a contention that can be established or refuted as to every class member using identical evidence. *Wal-Mart*, 131 S. Ct. at 2551. By contrast, where important "[d]issimilarities" divide the class members' claims, *id.* (citation omitted)—such as where "differences in the factual background of each claim will affect the outcome of the legal issue" in play, *Yamasaki*, 442 U.S. at 701—there is no way for the court to harmonize Rule 23's competing demands for both efficiency and fairness. At best, only one of those goals can be achieved in such situations. If individual issues are entertained, a common proceeding becomes unworkable. Or if (as is more likely) the court concludes that "the discrete components of the class members' claims and the [defendants'] defenses must be submerged" in the name of an efficient common trial, it will effectively "rework[ ]" the defendants' substantive rights and duties, and also deprive them of their right to present every available defense to each class member's individual claim. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

Neither result is acceptable under Rule 23. As this Court recognized in *Amchem*, the drafters of Rule 23 meant for certified class actions to achieve *both* efficiency *and* fairness, not for one to be sacrificed on

the altar of the other. *Amchem*, 521 U.S. at 615; *see also* Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966). Unless the district court is convinced, after performing the "rigorous analysis" Rule 23 requires, *Comcast*, 133 S. Ct. at 1432, that certifying the case for class-action treatment will assure the achievement of both aims, the proper course is to deny class certification.

The lower courts in this case deviated from that course and instead, as explained below, allowed "Trial By Average" to trump fairness, presumably so that the disparate claims of thousands of workers could be more efficiently resolved at once. That result pays no respect to Rule 23 or its objectives.

II. Allowing Statistical Averages To Dissolve The Differences Among Individual Class Members' Claims Impermissibly Trades Fairness For Efficiency

The Rule 23(b)(3) class in this case sought to aggregate the state-law claims of some 3,000 employees of petitioner's pork-processing plant for unpaid overtime, allegedly resulting from unpaid time that employees allegedly spent donning and doffing protective equipment and transiting between their lockers and the production floor. The Rule 23(b)(3) class claims were brought under Iowa's analogue to the FLSA, but no one disagrees that the plaintiffs' prima facie case is the same under both statutory schemes (*see* Pet. App. 5a n.2, 55a-56a): to hold his employer liable, a plaintiff must prove "that he performed work for which he was not properly compensated." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680,

686-687 (1946). While in some cases (those in which the employer's time records are inadequate or incomplete) plaintiffs are allowed a bit of leeway in trying to establish the *amount* of damages, *id.*, their obligation to prove "the *fact* of damage"—*i.e.*, that the employer failed to pay for work performed—is unwavering. *Id.* at 688 (emphasis added).

To merit class certification, then, it was respondents' obligation to prove, not just assert, that the claims of all 3,000 workers can be resolved "in one stroke" using identical evidence. *Wal-Mart*, 131 S. Ct. at 2551. Put another way, respondents were required to show that some common proof would allow the jury easily to answer the following question for each and every one of them: did this person perform any work for which petitioner owes him or her compensation?

One would think, given the factual basis of the claims here, that respondents' task at class certification would prove daunting, if not impossible. After all, whether any class member "performed work for which he was not properly compensated" by donning, doffing, and walking to and fro depends on a host of variables, all of them highly individualized. What type of protective equipment does she wear—if any? How long does it take her to put it on or remove it? Has her speed in donning and doffing increased over time with practice? How far is her locker from her work station on the production floor? How many paid hours did she actually log during the relevant pay periods?

As might be expected, these questions (and others) have very different answers for many if not most of

the class members. *See* Pet. Br. 30-31. That was reflected in, among other things, the large degree of variation observed by respondents' expert when conducting the time study that respondents relied on below: some workers took only seconds to don and doff, while others took upwards of five to ten minutes or more. Pet. App. 137a-138a. Indeed, the evidence showed that hundreds of class members had not even worked enough hours per week to be entitled to any overtime, irrespective of the time they allegedly spent donning and doffing, and that hundreds more had no more than *de minimis* (and thus non-recoverable) damages. *See* J.A. 415; Pet. App. 22a (Beam, J., dissenting).

No matter: respondents still got their Rule 23(b)(3) class certification, and a nearly $3 million judgment to boot—divided among 3,000 class members, including (presumably) those who should have received nothing. And all that was needed was some simple arithmetic. Respondents' expert simply computed the average amount of time class members in different parts of the plant spent on donning, doffing, and related activities, based on the observations recorded during the time study, and then applied those average times to the entire class. Respondents' damages calculation concededly assumed that all class members spent the same amount of time donning, doffing, etc., as the hypothetical "average" worker derived from the time study; that assumption is plainly false, as shown by the range of times observed during the study, which exhibited "a lot of variation," as respondents' expert readily conceded. J.A. 387. Nevertheless, it did enable the class claims to be tried efficiently and expeditiously to a single jury—at the cost

of petitioner's right to challenge the validity of hundreds of the claims leveled against it.

That result cannot be reconciled with this Court's cases, Rule 23, or the Rules Enabling Act. Those authorities all make plain that the "Trial By Average" upheld here has no place in a courtroom.

A. This Court Has Held That "Trial By Formula" Is Not Permitted Under Rule 23 And The Rules Enabling Act

In *Wal-Mart*, this Court instructed that the class-certification inquiry should focus on whether there is sufficient commonality—not just in terms of the legal claims involved, but also in terms of how they will be adjudicated—"to believe that all [the class members'] claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551. Central to that examination, the Court also said, is whether there are "[d]issimilarities within the proposed class [that] ... have the potential to impede the generation of common answers," the whole point of the class-action procedure. *Id.* (citation omitted).

That was the case in *Wal-Mart*: each of the class members there alleged that her supervisor exhibited a pattern or practice of discriminating against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See* 131 S. Ct. at 2547, 2552. But one form of class relief sought was backpay, a necessarily individualized remedy, which the employer has the right to contest by showing that, regardless whether a general pattern or practice was established, an "individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 2561.

Unlike the decisions below, this Court did *not* decide that those defenses should be limited for expediency's sake. Instead, the Court aimed for the result that would best honor Rule 23's twin objectives of efficiency and fairness. And so, confronted with a plan to "replace [normally required individual] proceedings with Trial by Formula," *i.e.*, extrapolating the defendant's classwide backpay liability from the results of a sample set of claims that would be tried to a master, the Court flatly rejected that "novel project" as inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b), because it would deny the defendant its right "to litigate its ... defenses to individual claims." 131 S. Ct. at 2561. *Wal-Mart* thus disapproved efforts to gloss over "[d]issimilarities" between class members on liability issues by using statistical extrapolations or averages to hide them.

Comcast extended that principle to damages issues, holding that where damages are tried on a classwide basis, the measure of damages must track the class's theory of liability; the damages awarded to the class may not be "arbitrar[ily]" based on a statistical model that fails to measure only those losses that are fairly attributable to the allegedly wrongful conduct underpinning the class's claims. *Comcast*, 133 S. Ct. at 1433-35. If the class plaintiffs' theory of liability would result in different answers on the damages question for each class member, then their damages are not susceptible of classwide proof and thus cannot be certified for classwide adjudication. Statistical models at best obscure that reality; they cannot change it.

Here, the decisions below upholding class certification under Rule 23(b)(3) violate the teachings of both

Wal-Mart and *Comcast*. In essence, what the decisions below endorse is "Trial By Average." The Eighth Circuit disagreed that the procedure employed here constituted the type of "Trial By Formula" that *Wal-Mart* condemns. Pet. App. 10a-11a. But what is an average *if not* a formula? And as employed here, it had the identical pernicious effect as the procedure this Court disapproved in *Wal-Mart*: depriving petitioner of its right to present individual liability defenses to the real claims of individual class members being leveled against it. *Comcast*, 131 S. Ct. at 2561. In doing so, the class-trial procedure employed here effectively "abridge[d] ... [petitioner's] substantive right," while "enlarg[ing]" those of the hundreds of undamaged class members who stand to receive monetary awards as their share of the judgment, all in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b). At the same time, petitioner lost its due-process right to "an opportunity to present every available defense." *Lindsey*, 405 U.S. at 66.

The decision below runs equally afoul of *Comcast*. Like the plaintiffs in *Comcast*, respondents here set out to try the issue of damages to the court on a classwide basis, rather than reserving that issue for later individualized proceedings. And like the plaintiffs in *Comcast*, respondents here proposed to try damages using a "model" that did not even try to measure the actual damages—and no more—attributable to respondents' theory of the case. *Comcast*, 133 S. Ct. at 1433. Indeed, the average-and-extrapolate method used by respondents here did not even purport to measure, much less aggregate, the amount of damages allegedly incurred by the actual class members themselves. Instead, respondents'

method assumed that each and every one of them had suffered the same or roughly the same amount of damages as the statistical average worker, and thus multiplied that figure by the number of class members.

Not even in Lake Wobegon would one encounter such uniformity. (At least there, every child is somewhere *above* average.) And in fact, the record discloses, the assumption underlying respondents' calculation is untrue: respondents' experts conceded both that there was significant variation in the time workers spent donning, doffing, etc., and that hundreds of workers (at least) had worked no compensable overtime at all. Pet. 9, 11. In short, respondents' damages formula was not at all tied to the liability case underpinning any actual class member's claim. It therefore was "arbitrary" as a measure of class-wide damages, and respondents' proposal for class certification under Rule 23(b)(3) should have been rejected on that basis. *Comcast*, 133 S. Ct. at 1433.

B. "Trial By Average" Improperly Allows Uninjured Plaintiffs To Recover And Allows Plaintiffs To Manipulate The Amount Of Damages

This Court's class-certification cases have consistently demanded that courts undertake a "rigorous analysis" of whether granting class certification is consistent with Rule 23's requirements. *Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551; *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160-61 (1982). While advising that "Rule 23 provides [the general] formula for deciding the class-action question," *Shady Grove Orthopedic Assocs., P.A.* v. *All-*

state Ins. Co., 559 U.S. 393, 399 (2010), the Court notably has *not* said what role, if any, *statistical* formulas such as averages should play in a court's class-certification analysis.

Now that the question is before it, the Court should hold that the use of a formula, such as extrapolation from statistical averages, is not an acceptable means of establishing the existence of a "common contention" that binds the putative class claims together, much less of answering that "common contention" on a classwide basis. *Wal-Mart*, 131 S. Ct. at 2551. Indeed, rather than facilitating the necessary "rigorous analysis" to determine whether there are significant "[d]issimilarities within the proposed class" that render certification inappropriate, *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted), averaging techniques like those used here *conceal* those dissimilarities, by smoothing them over until they disappear. Class members with low (or even *de minimis*) damages may be made to appear as if they have substantial claims, and those with no damages at all may be made to appear injured.[4] In doing so, averaging techniques and statistical formulas merely supply a convincing illusion of commonality, which then, all too often, is allowed to substitute for the real thing. And in the process, judicial economy trumps fairness to defendants. *See* Part I, *supra*.

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[4] The unfairness of course can work in the other direction, too, as class members with greater damages—but perhaps still not enough to warrant them opting out and going it alone—are made to appear as if their damages are smaller. *See, e.g.*, Ghoshray 499 (noting that class adjudication "does not allow absent class members to stake claims for injury dissimilar to the representative plaintiff's claimed injuries").

Even worse, formulas and extrapolations like those respondents have relied on here tend to be opaque, inaccessible, and (what is most problematic) easily misunderstood. Because few lawyers and judges (and even fewer jurors) are trained statisticians, the use of flawed statistics leads all of them to draw inferences that the data cannot reasonably support. *See generally* A.L. Phillips, G.M. Phillips, & M.S. Williams, *What's Good in Theory May Be Flawed in Practice: Potential Legal Consequences of Poor Implementation of a Theoretical Sample*, 9 HASTINGS BUS. L.J. 77 (2012). Naturally, the quality of statistical evidence presented in class actions, including wage-and-hour class actions, is not always high, and very often is quite poor indeed, reflecting "an overreliance on summary measures such as overall averages to determine whether class treatment is appropriate." N.D. Woods, *Statistical Analysis and Class Actions: Part 2*, LAW360, May 28, 2015, at 1 (Woods, *Part 2*) ("Too often analyses advanced in support of certification in wage-and-hour class and collective actions fail to critically assess commonality issues in a statistically rigorous manner.").[5]

As a result, statistical extrapolation should not be regarded as a proper basis for the "rigorous analysis" required under Rule 23. At the very least, the proposed use of such techniques to certify a class should trigger a healthy degree of caution and skepticism from the courts.

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[5] This article, as well as the others in the series comprising it, is available here: http://www.edgeworthseconomics.com/experience-and-news/publications/resource:05-28-2015-statistical-analysis-and-class-actions-part-1/.

1. Extrapolating From Average For A Sample Can Obscure Class Members' Dissimilarities, Such As Lack Of Injury

This Court's class-certification decisions instruct federal courts to "rigorous[ly] analy[ze]" the issue of commonality, examining whether significant "[d]issimilarities [exist] within the proposed class [that] ... have the potential to impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). Averaging techniques like those employed in this case more often than not impede rather than aid that analysis. As experts recently have commented, specifically in the context of wage-and-hour cases like this one, "it is critical not to be misled by averages that may mask important underlying variability." N.D. Woods, *Statistical Analysis and Class Actions: Part 1*, LAW360, May 27, 2015, at 1 (Woods, *Part 1*). "A simple average cannot necessarily shed light on the experience of any given subset of the [class members] analyzed." *Id.* at 2. The average alone cannot account for the "underlying variation" that may lurk in the population the average is supposed to represent. *Id.* And where that "underlying variation"—the "spread" or "dispersion" associated with the underlying data set, which can be quantified—is large relative to the average, the average is far more likely to mislead than to enlighten when extrapolated to the larger population. *Id.*

Those dangers are on full display here. The "average" uncompensated overtime that supported the damages calculation in this case was drawn from a sample that exhibited what respondents' expert conceded to be "a lot of variation": some workers took

less than a minute to don, doff, etc., while others took five or even ten to perform the same tasks. J.A. 387; Pet. App. 137a-138a. Obviously there would also be some variation as well in the amount of time it took each worker to travel between his or her locker and the production floor, depending on where one's locker is in relation to one's work station. And, the trial evidence also showed, not every worker had the same equipment to don and doff, and not every worker went about those tasks the same way: some continued donning their equipment while on the line, others did not. Pet. Br. 12.

In the end, these myriad variations were set aside entirely: respondents treated every worker as if he or she were entitled to be paid for the "'all-in' average" of either 18 or 21.25 minutes (depending on which floor each worked on), and the jury presumably calculated a seven-figure plaintiffs' award on that basis. Pet. Br. 8-9. That result is doubly flawed. *First*, the judgment shortchanged any workers who may have been entitled to more than this "average." *See Espenscheid* v. *DIRECTSAT USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013); Woods, *Part 1*, at 2 (discussing an example in which 50 employees work 20 hours off-the-clock per week, and 50 more work zero hours per week; the average for all 100 is ten hours per week, which "is clearly not an adequate measure of actual time worked off-the-clock since it misses the mark entirely for both [groups]"). And *second*, at least as problematic, the judgment gave a windfall to those who had worked less—including more than 700 class members who had not logged enough hours to be entitled to any overtime, or whose overtime pay would have been merely *de minimis* (and thus non-

recoverable). *See* Pet. App. 22a (Beam, J., dissenting); *see also Mt. Clemens*, 328 U.S. at 692. Had they brought their cases individually, they should have taken nothing at all, whereas if this Court upholds the judgment, each of those unentitled class members presumably will be entitled to share in it.

Again, the Rules Enabling Act forbids federal rules of procedure, like Rule 23, from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). One can scarcely imagine a more blatant violation of that rule than allowing a cash award to claimants who are legally entitled to nothing, simply because their claims were brought in a class action. The result also seriously threatens the important limitations that exist on federal-court jurisdiction. Workers who have received all the wages they are due under the law have suffered no injury, in fact *or* in law, that is capable of being redressed by a court; as such, they cannot establish what this Court has referred to as "the irreducible constitutional minimum of standing," "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Consequently, had the hundreds of uninjured workers here tried to bring their cases to the district court individually, each would have been turned away for lack of a justiciable claim. Just as a case's status as a class action cannot alter the parties' substantive rights, it also cannot give standing to the uninjured claimants lurking within the broader class. Rather, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 623; *accord* Fed. R. Civ. P 82.

It offends the Constitution, the applicable statutes, and Rule 23 to allow uninjured plaintiffs to recover simply by being lucky enough to fall within the definition of a certified class. Yet *exactly that unlawful result* follows naturally, if not inevitably, from allowing proof about a fictional "average" employee to stand in for proof about the actual class members. *See Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (holding that damages could not be resolved on a classwide basis by computing lost profits based "on abstract analysis of 'averages'" calculated for a "fictional 'typical franchisee operation'"). By diverting the court's focus away from the actual class members, and how they are similarly or dissimilarly situated, averaging techniques like those used in this case too easily allow uninjured claimants to be smuggled in under the cover provided by the broader class action.

Allowing that to happen relieves plaintiffs seeking class certification of their burden to "affirmatively demonstrate [their] compliance with" Rule 23 by "prov[ing] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. And it allows courts to shirk the "rigorous analysis" Rule 23 demands to determine whether "all [class members'] claims can productively be litigated at once." *Id.* Thus, for instance, in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), the court upheld allocating *to defendants* the burden of showing that there are more than a *de minimis* number of uninjured claimants in the class; the court thus assumed that classwide extrapolation from an average was proper unless the defendant could prove otherwise. *See id.* at 28. At the

same time, extrapolations from averages destroy valuable defenses to individual class members' claims, depriving defendants of their due process rights in the name of administrative convenience. *See Lindsey*, 405 U.S. at 66; Ghoshray 498-99 ("[W]ithin the context of sampling, extrapolation allows a non-plaintiff [class member] to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," but "does not ... allow the defendant a reciprocal opportunity to defend against each absent class member"). The Court should bring an end to the statistical alchemy that enables all of these abuses.

2. Sampling And Extrapolation Can Mislead Decision-Makers Into Awarding Inflated Damages

Even beyond the issue of averaging, there is another problem with the statistical methods that are now commonly used to justify class certification: reliance on improper sampling techniques that distort the overall picture of the class being provided to the court.

Data from a self-selected, biased, or otherwise non-representative sample can tell the court nothing about the population. To draw inferences from a sample about what is likely true about the entire population, the sample must be appropriately representative of the population. *See, e.g.*, Ghoshray 482; N.D. Woods, *Statistical Analysis and Class Actions, Part 3*, LAW360, May 29, 2015, at 2 (Woods, *Part 3*). And for a sample to be appropriately representative, it *must* be randomly selected. *See* Ghoshray 482-83; *accord* Phillips 80. Indeed, even self-described advo-

cates of "Trial By Formula" agree on this much: "Random selection is critical to obtaining a useful sample" that can be fairly extrapolated to the entire class. A.D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 624-25 (2012) (Lahav) ("One must always suspect that any nonrandom method of picking sample cases will be skewed and therefore be an inaccurate estimate of the population average."). Randomness is sometimes difficult to ensure, as both courts and commentators have noted: design errors in the sampling procedure may introduce certain biases, such as non-response bias,[6] that undermine randomness and thus skew the results of the study. *See* Phillips 90-91; *Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 43 (2014).

Moreover, while randomness is *necessary* for representativeness, not every random sample will *guarantee* representativeness. "Simple random samples[7] assume the presence of a singly reasonably homogenous distribution with relatively little variation around an average outcome. When substantial varia-

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[6] "Nonresponse bias can occur if a sample is chosen randomly from a group containing only survey respondents. The potential for bias arises because those who do not respond have *no* probability of inclusion in the sample. Thus, although the participants are randomly selected from among respondents, the sample will not reflect the characteristics of the members of the population who chose not to respond to the survey." *Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 43 (2014).

[7] A "simple random sample" refers to choosing one subset of a given size from one larger population, where each individual is chosen randomly and entirely by chance. There are other sampling designs that can be used as well, which can compensate for the limitations of simple random sampling. *See* Woods, *Part 3*, at 2 & n.7.

tion exists in the population studied, a simple random sample ... will lead to estimates measured with too much error." Woods, *Part 3*, at 2. And, where establishing commonality is concerned, "simple random samples are simply inadequate," because their implicit assumptions—that the population exhibits little variation around the average—is precisely what is in dispute and must be proved, making reliance on simple random sampling entirely circular. *Id.* ("For a sample to be useful in the assessment of class certification topics it must allow the analyst to test whether differences exist within subparts of the proposed common class."). As the California Supreme Court recently observed in a landmark class-certification decision, "[a] sample that includes even a small number of interested parties"—such as the self-selecting workers just described—"can produce biased results." *Duran*, 59 Cal. 4th at 43. Moreover, "[t]he impact of this error is magnified when the biased results are extrapolated to the entire population," and "cannot be cured simply by increasing the size of the sample." *Id.* ("When a selection procedure is biased, taking a large sample does not help. This just repeats the basic mistake on a larger scale." (quoting Freedman *et al.*, *Statistics* 335 (4th ed. 2007)).

Here, the time study that respondents used to derive the average that underpinned their liability and damages case concededly did not examine a random sample. Indeed, respondents' expert admitted as much: because the time study openly observed whichever worker was performing a particular activity at the time, the workers themselves could control whether they would be included in the study, by

choosing to perform a certain activity while observed or not. Because the sample produced from the time study admittedly was not random, J.A. 359, there is also no basis for concluding, as the Eighth Circuit apparently did, that it was "representative." Pet. App. 13a. Even those who put great faith in adjudication by statistical inference recognize that such a conclusion is "suspect": "Good social science methods require a random sampling to avoid bias." Lahav 590. Many of the courts that have addressed the issue agree. *See Espenscheid*, 705 F.3d at 774 (suggesting that a non-random sample could turn out to be representative only "by pure happenstance"); *Duran*, 59 Cal. 4th at 43 ("A sample must be randomly selected for its results to be fairly extrapolated to the entire class.").

Averaging always has a powerful ability to conceal class members' dissimilarities, but it does even greater damage to defendants' rights when the average is derived from a biased sample. Extrapolating such an average to the entire class not only gets the numbers wrong for individual class members, but also inflates the *aggregate* amount of damages to the class as a whole. If, for example, the sample from which the average was calculated is skewed, such that it includes a disproportionate number of the most-harmed class members and far fewer of those who have suffered little or none, then of course the average amount of damages computed will be skewed higher as well. *See, e.g.*, Woods, *part 3*, at 2; Phillips 96 (discussing home-defect class action in which plaintiffs' experts extrapolated damages from a sample infected with self-selection bias that resulted in the sample "overestimat[ing] the number defects per

home by more than 25 percent"). And when that skewed average is extrapolated to the entire class, it would likely "result in an astronomical figure that ... bears little or no relationship to the amount of economic harm actually caused by defendants." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

Judge Benton thus was fundamentally wrong in opining that the dispute over the use of averaging was just about "how the fund is allocated among class members," a subject in which he thought petitioner "ha[d] no interest." Pet. App. 131a; *see Espenschied*, 705 F.3d at 774. The use of sampling and averaging renders the amount of the final damages number itself suspect, especially as the statistical methods used often are not sufficiently robust. *See* Woods, *Part 3*, *supra*, at 2-3. In such cases, the use of shoddy statistics and an audience—judges and juries—that has not been trained how to spot them effectively allows defendants' liability to be increased beyond what the law allows, merely because the case is proceeding as a class action—indeed, so that the case may be a class action. Allowing the class to recover greater damages than the class members all together have incurred works a further violation of both the Rules Enabling Act and the federal Constitution. *See McLaughlin*, 522 F.3d at 231.

The Court in this case should put an end to class-action lawyers' efforts to use such devices instead of properly proving what Rule 23 actually requires: true commonality among the class members' claims, such that they "can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551. Recent experience with the application of statistical extrapolation—

particularly the brand used by the class-plaintiffs' bar to establish commonality, predominance, and manageability—has shown that in class-certification disputes these techniques tend to harm more than help and mislead more than enlighten. The time has come to strictly circumscribe, if not outright prohibit, its role in the Rule 23 analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, et al., Individually and on Behalf of All Other Similarly Situated Individuals,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ECONOMISTS AND OTHER SOCIAL SCIENTISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are economists (including a Nobel laureate) and social scientists with extensive experience in using statistical and other empirical methods in academic, professional, regulatory and litigation settings.[2] As such, we have a substantial interest in ensuring that the Court's treatment of these issues comports with accepted economic and scientific principles. Petitioner Tyson Foods, Inc. ("Tyson") and various amici in support of Petitioner have advanced arguments that suggest that the use of "average" or statistical evidence is unreliable as a matter of law. These arguments, if accepted, would have far-reaching and in our view negative consequences in litigation. We respectfully submit this brief to emphasize the extent to which modern empirical methods – including statistics – are entirely reliable and in many cases valuable in class actions and other complex litigation settings. We firmly believe that statistics can help courts (and juries) make better decisions than they could in the absence of data.

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[1] The parties have lodged blanket consents to the filing of amicus briefs with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae has made a monetary contribution to its preparation or submission.

[2] A list of amici is set forth in Appendix 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rigorous empirical analysis – including the use of "average," "sampled," and statistical data – is a staple of economics and many other scientific disciplines. Average industry data can be highly revealing, for example, about overall market trends concerning supply, demand, price, and many other factors that might be relevant to a particular study or litigation matter. Economists and other professionals use such data all the time for all manner of inquiries, including, *inter alia*, investigations of market fraud, cartel conduct and effects, other civil and criminal market manipulation schemes, and much more.

So, too, with statistics. Multiple regression analysis, for example, is a bedrock tool of science and economics, and regression analysis by definition uses "average" data analysis to reveal broader industry and market trends. Econometric models employing regression techniques have been used in peer-reviewed articles published in major economics journals to study a wide variety of economic questions, including: the price effects of the 19th century railroad cartel,[3] the end of the reserve clause in baseball,[4] the price effects of mergers in the beer

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[3] Robert H. Porter, *A Study of Cartel Stability: The Joint Executive Committee, 1880-1886*, Bell Journal of Economics, Autumn 1983, at 301-314.

[4] Gerald W. Scully, *Pay and Performance in Major League Baseball*, American Economic Review, Dec. 1974, at 915-930.

industry,[5] the likely effects of the proposed merger between Staples and Office Depot,[6] the demand for automobiles,[7] the analysis of competition in retail food markets,[8] estimating the change in consumer welfare from the introduction of minivans,[9] and empirical studies of auctions that examine the effect of auction rules on winning bids.[10]

It is also beyond question that multiple regression analysis is used routinely and reliably in many

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[5] Jonathan B. Baker & Timothy F. Bresnahan, *The Gains from Merger or Collusion in Product-Differentiated Industries*, Journal of Industrial Economics, A Symposium on Oligopoly, Competition and Welfare, June 1985, at 427-444.

[6] Orley Ashenfelter, et al., *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples*, International Journal of the Economics of Business, July 2006, at 265-279.

[7] Berry S. Levinsohn, Jr. & Ariel Pakes, *Automobile Prices in Market Equilibrium*, Econometrica, June 1995, at 841-890.

[8] Aviv Nevo, *Measuring Market Power in the Ready-to-Eat Cereal Industry*, Econometrica, March 2001, at 307-342.

[9] Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan*, Journal of Political Economy, Aug. 2002, at 705-729.

[10] Ali Hortacsu & David McAdams, *Mechanism Choice and Strategic Bidding in Divisible Good Auctions: An Empirical Analysis of the Turkish Treasury Auction Market*, Journal of Political Economy, Oct. 2010, at 833-865. *See also*, Alvin E. Roth & Axel Ockenfels, *Last-Minute Bidding and the Rules for Ending Second-Price Auctions: Evidence from eBay and Amazon Auctions on the Internet*, American Economic Review, Sept. 2002, at 1093-1103.

litigation settings, including class actions.[11] To cast doubt on these methods as a general proposition, as Tyson invites the Court to do, is to misapprehend the

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[11] For example, as stated in the ABA SECTION OF ANTITRUST LAW, ECONOMETRICS (2d ed. 2014) at xiii, "Econometrics plays a central role in modern antitrust litigation and merger analysis, and economic experts are regularly the star witnesses in court and before the enforcement agencies." Similarly, the Federal Judicial Center's Reference Manual on Scientific Evidence states: "Over the past several decades the use of regression analysis in court has grown widely. Although multiple regression analysis has been used most frequently in cases of sex and race discrimination and antitrust violation, other applications have ranged across a variety of cases, including those involving census undercounts, voting rights, the study of the deterrent effect of the death penalty, and intellectual property." *See* David Rubinfeld, *"Reference Guide on Multiple Regression," in* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 419, 420 (3d ed., 2011) (footnotes omitted); *Bazemore v. Friday*, 478 U.S. 385, 398-401 (1986) (per curiam) (Brennan, J., joined by all members of the Court, concurring in part) (statistical analysis of "average black employee" data in discrimination case supports inference of individual injury). *See also In re Neurontin Marketing and Sales Practices Litig.*, 712 F.3d 21, 42 (1st Cir. 2013) ("regression analysis is a well recognized and scientifically valid approach . . and courts have long permitted parties to use statistical data to establish causal relationships" in class actions and many other settings) (collecting cases); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660-61 (7th Cir. 2002) (permitting use of regression analysis to show causation in antitrust case); *Chin v. Port Authority of New York and New Jersey*, 685 F.3d 135, 152-53 (2d Cir. 2012) (statistical evidence is highly relevant in discrimination cases); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir. 2011) (approving average time study as "a more accurate representation" of donning and doffing times in FLSA case).

world of economics and science in a troubling and extraordinary way.

None of this is to say, of course, that all average or statistical data is sound and reliable. Just as Tyson and certain amici go much too far in suggesting a categorical problem with such data, no self-respecting economist would assert that average or other statistical evidence is always used in a responsible way. Sometimes it is not. Appropriately used, however, statistics has its place in civil litigation, and in particular class action litigation under Rule 23 of the Federal Rules of Civil Procedure. Nothing in the Federal Rules of Evidence nor in the Rule 23 criteria disqualifies statistical evidence from being among the kinds of information judges may rely upon in their decision to grant or deny class status, or, for that matter, in any other phase of class action litigation. To the contrary, statistics can help courts make better decisions than they could without it. To adopt a sweeping rule of law that would remove potentially valuable information from judicial decision making is neither warranted, desirable, nor necessary to resolving this case. The Court should be mindful not only of the broad consequences of any direct holdings on these issues, but the potential unintended consequences of any language in the Court's opinion that could impact the use of "average" or "statistical" proof as a general matter of law.

The correct approach to these issues does not lend itself to hard and fast rules but rather to case-specific analysis. Some studies are valid and reliable.

Others are not. Either way, the expert's particular methods are the relevant question. And there can be no substitute, in law, economics or science, for doing the fact-bound work necessary to evaluate whether a given study is reasonable in context. That inquiry cannot be reduced, as Tyson would have it, to broad attacks on "average," "statistical," and other representative evidence in class actions or any other setting. The Court should avoid reaching any such holding, the unintended consequences of which would be serious in a wide range of federal cases.

ARGUMENT

I. STATISTICS IS A VALUABLE TOOL, WIDELY AND RELIABLY USED IN ECONOMICS AND SCIENCE.

Life is full of uncertainty, in the face of which individuals, businesses and policymakers must make a host of important choices. In this world of imperfect information, we could make guesses – even informed guesses – to determine what investments to make, what policies to follow, or what treatment to prescribe to a sick patient. What statistics offers is a scientific alternative to guesswork. As the American Statistical Association defines it: "Statistics is the science of learning from data, and of measuring, controlling, and communicating uncertainty."

Applied properly, statistics enables us to base decisions to the fullest extent possible on the available

information, or data. Statistics also allows us to quantify the degree of confidence we have in the data-based evidence on which our decisions are based. Guesswork does not. We prefer the scientific approach to the alternative.

Statistical methods can be divided into two broad classes: those that are descriptive, and those that are inferential. Descriptive statistics consists of mathematical methods designed to characterize certain aspects of a given set of data. Information relevant to a decision is often numerous and complex, and descriptive statistics lets us reduce this complexity so that it becomes accessible to the human mind. An important descriptive tool – and one that is the source of some contention in the present case – is averaging. Consider the way in which economists study fundamental questions of supply, demand, and price in a given industry or market. As a matter of course, we use average data, reflecting the possibly millions of transactions in that market, to understand and test the relevant trends and relationships. Far from being suspect, as Tyson seems to suggest, average data can be a highly useful and reliable tool in economics and many other disciplines.

Inferential statistics, on the other hand, comprises methods that allow us to use what is known to make estimates and predictions about the unknown. All inferential techniques in statistics are, in one way or another, based on the well-accepted concepts of sampling and extrapolation. Sampling refers to the idea that observed information is an incomplete,

grainy snapshot – a sample – taken from a larger universe of potentially observable information, called the population. Extrapolation means that this sample, although incomplete, can still be reliably informative about the population from which it is obtained. A medical treatment that is approved for general use only after it has been shown to be sufficiently safe and effective in a clinical trial is a classic example of decision making based on sampling and extrapolation.

Good statistical practice calls for data collection procedures that minimize the risk of unrepresentative sampling, analytical tools appropriate to deal with a given sample, and trained interpretation that recognizes the potential limitations of both data and techniques. Used properly in this fashion, statistical methods serve as an illuminating and valuable interface between the often enormous quantities of data that can inform a particular investigation, and the human decision makers that must somehow make sense of this wealth of information.

II. STATISTICS AND EMPIRICAL ANALYSES CAN BE VALUABLE IN LITIGATION SETTINGS.

Statistical tools are important not only in science and economics generally, but also in litigation. Statistics and other empirical methods can contribute to answering questions as diverse as the following: After accounting for differences in qualifications, were

female employees of a firm discriminated against in promotion and compensation decisions? How much were purchasers of a product overcharged by suppliers who conspired to fix prices? Did a car manufacturer place drivers at risk of injury by installing faulty parts in its vehicles? Were minority borrowers given less favorable loan terms by a lender than white borrowers, after taking into account differences in credit scores? Were consumers misled by an alleged trademark infringement? Did health care providers engage in systematic overbilling? What is the proper measure of lost profits or damages in a given commercial dispute? These questions are among the many that American courts are routinely asked to decide, and as we enter the age of "big data," the value of statistical methods in answering them will only increase.

We believe the importance of statistical analysis – or "learning from data" – is further magnified in class action lawsuits, in which individual claims are aggregated. This is because there is typically more data available in such cases, and thus, more to learn. The law permits the aggregation of claims for reasons of both efficiency and fairness. These reasons are not undermined if statistical tools are used to describe or analyze the totality of the claims in a class action. To the contrary, as more data is available for analysis, as is likely when multiple claims are aggregated, more questions can be answered, *and can be answered better*, through rigorous statistical examination of the data. To restrict the contribution that statistical tools

are permitted to make in these instances is to ignore the vast amounts of useful information often available in class action cases.

In making this argument, we do not advocate "trial by formula" (a label that Petitioner and certain amici employ to describe the use of statistical proof) to replace responsible judicial decision making. This label reflects a profound mischaracterization of the responsible application of statistical methods in litigation. Statistical algorithms cannot make decisions for courts, but statistical evidence can inform them.

Against this backdrop, the central point we wish to make in this amicus brief is that the Court should not cast doubt on statistical and empirical methods as a general matter, whether in class actions or otherwise. Statistical tools are far too valuable, and are used responsibly and reliably in far too many contexts, for this Court to cast doubt on their utility. Indeed, we respectfully submit that the Court should *embrace* the value of statistical analysis of empirical data as a category of proof in complex litigation that, used properly, can shed significant light on disputed issues.

III. WHETHER EVIDENCE IS RELIABLE IS FACT-DEPENDENT.

That is not to say that a *particular* expert study should be accepted uncritically. The reliability of expert evidence is inherently context-dependent, and

there is no question a given study may or may not be appropriate in a particular case. But that inquiry does not turn in any meaningful way on generic labels such as "average" or "statistical" or "extrapolated." Just as no sensible economist would cast categorical doubt on the use of such methods, the Court should exercise the same restraint.

Caution is particularly warranted given that the expert study in *Tyson* – an "average" time study by an industrial engineer – is so far removed from the use of economic and statistical data in many other litigation settings. As economists and social scientists with no expertise in industrial engineering, we take no position on the merit of the Tyson time study. We emphasize, however, that the case presents an inappropriate record on which to make general pronouncements about the reliability of statistical or empirical studies in other class actions.

The case does not involve multiple regression analysis, for example, an accepted tool that uses standard statistical techniques to control for relevant variables (including, for example, certain individual class member characteristics) and to test empirically the extent to which a given regression model reliably describes the relevant population, process or variable of interest. These methods bear little resemblance to anything at issue in *Tyson*.

Petitioner and amici nevertheless conflate these dissimilar methods to advance the sweeping argument that class actions should not be certified using

any type of average or statistical proof. But the Court should not use a particular donning and doffing study to address empirical methods not at issue. Instead, the Court should adhere to the traditional gatekeeping standards of Rule 702 and *Daubert*,[12] which provide an appropriately case-specific framework for evaluating the reliability of a particular expert analysis. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (*Daubert* "gatekeeping inquiry 'must be tied' to the 'facts' of a particular case . [because] [t]oo much depends on the particular circumstances of the particular case at issue") (quoting *Daubert*, 509 U.S. at 591).

Tyson and various amici nevertheless attempt to re-cast what, fundamentally, should be a fact-bound *Daubert* analysis into a broader question of law on the use of "average" and "statistical" proof in any and all class actions. Tyson's reasons for doing so are obvious – having apparently failed to file a *Daubert* motion to develop these issues in the proper way – but the Court should not allow Tyson to end-run that failure by reaching an unnecessarily broad holding of law that could trigger serious unintended consequences in cases far beyond the wage and hour context. *Cf. Glossip v. Gross*, 135 S. Ct. 2726, 2744-45 (2015) (rejecting petitioners' attempt to re-cast what "is more of a *Daubert* challenge" to contested expert testimony).

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[12] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In the end, the Court should be mindful of the longstanding economic and scientific acceptance of "average" and statistical analysis in many different contexts – including class action litigation – in light of which the undersigned respectfully submit that the Court should evaluate the *Tyson* expert issues in a narrow, fact-bound way as opposed to the categorical terms suggested by Petitioner and other amici.

CONCLUSION

For the reasons hereinabove stated, amici respectfully request that in resolving the questions presented in the *Tyson* matter, the Court limit its holding to the narrow facts at issue in that case.

Respectfully submitted,

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Dr. Robin Ann Cantor is a Managing Director at Berkeley Research Group, LLC and has more than 30 years of experience in the areas of applied economics, statistics, risk management, and claims analysis. Before joining BRG, Dr. Cantor led practice groups at national consulting firms, was Program Director for

Decision, Risk, and Management Sciences, a research program of the National Science Foundation; and was a senior researcher at Oak Ridge National Laboratory. Dr. Cantor has a faculty appointment at Johns Hopkins University and has served on scientific advisory committees for the National Academies of Science, the National Science Foundation, the U.S. Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the National Academy of Public Administration, the JHU School of Engineering, and Carnegie Mellon University. She is a past President and Fellow of the International Society for Risk Analysis; a past President of the Board of Directors for MATRIX, The Business Center for Women and Minorities; and is the current President of the Women's Council on Energy and the Environment. Dr. Cantor has published extensively on numerous topics in economics and her publications include peer reviewed articles, book chapters, expert reports, reports for federal sponsors, a book on the foundations of economic exchange, and an edited book on product liability. Dr. Cantor has testified as an expert on economic damages, statistical models and estimation methods, and class certification issues, among other areas.

Dr. David W. DeRamus is a Partner and founding member of Bates White LLC, an economic consulting firm. Dr. DeRamus specializes in the economic analysis of antitrust, transfer pricing, commercial litigation, and energy issues. Over the past 20 years, Dr. DeRamus has testified as an expert witness and

served as a consulting economist in numerous antitrust, regulatory, and other commercial disputes, mostly with respect to damages issues.

Dr. Mark J. Dwyer is an economist specializing in empirical methods applied to antitrust and class actions. Over the past 10 years he has provided testimony to several state and federal courts in these areas. He has worked as a consulting economist in these fields for the past 14 years. Prior to that he was an assistant professor in the UCLA economics department.

Dr. Andrew Gelman is a professor of statistics and political science and director of the Applied Statistics Center at Columbia University. He has received the Outstanding Statistical Application award from the American Statistical Association, the award for best article published in the American Political Science Review, and the Council of Presidents of Statistical Societies award for outstanding contributions by a person under the age of 40. His books include *Bayesian Data Analysis* (with John Carlin, Hal Stern, David Dunson, Aki Vehtari, and Don Rubin), *Teaching Statistics: A Bag of Tricks* (with Deb Nolan), *Data Analysis Using Regression and Multilevel/Hierarchical Models* (with Jennifer Hill), *Red State, Blue State, Rich State, Poor State: Why Americans Vote the Way They Do* (with David Park, Boris Shor, and Jeronimo Cortina), and *A Quantitative Tour of the Social Sciences* (co-edited with Jeronimo Cortina).

Dr. Vivek Ghosal is a Professor in the School of Economics at Georgia Institute of Technology. Professor Ghosal has published two edited books: *The Political Economy of Antitrust* (Elsevier, 2007) and *Reforming Rules and Regulations: Laws, Institutions and Implementation* (MIT Press, 2010), and is a member of the Editorial Boards of the journals *Review of Industrial Organization* and *Business Strategy and the Environment*. He has published in peer-reviewed journals in economics, management, and law & economics, including: *Journal of Industrial Economics*, *International Journal of Industrial Organization*, *Journal of Law and Economics*, *Review of Economics and Statistics*, *Research Policy*, *Small Business Economics*, *Managerial and Decision Economics*, *Business Strategy and the Environment*, *Journal of Competition Law & Economics*, *Review of Industrial Organization*, and *Review of Law & Economics*. Prior to joining Georgia Tech in 2001, Professor Ghosal was an Economist at the Economic Analysis Group of the Antitrust Division, U.S. Department of Justice.

Dr. Michael Harris is President of Harris Economics Group, LLC and has been a consulting economist for the last 28 years. He specializes in applied microeconomics and industrial organization and has served as a testifying economic expert in over seventy engagements before state and federal courts, the Federal Energy Regulatory Commission, numerous state regulatory commissions, the Ontario Energy Board, and the Alberta Energy and Utilities Board.

The matters on which he has provided testimony and consulting include energy market regulation, antitrust issues, class certification, and damages.

Dr. Ken Hendricks is Professor of Economics at the University of Wisconsin-Madison. His primary field of research is industrial organization. He has conducted theoretical and empirical studies on bidding behavior in auctions. His research also includes studies on the demand for music, games of timing, sender-receiver games, and airline networks. He currently holds the Christensen Chair of Economics at the University of Wisconsin-Madison. He is an associate editor of the *American Economic Journal: Microeconomics* and is on the editorial board of the *Journal of Economic Literature*. He is a research associate of the National Bureau of Economic Research and a Fellow of the Econometric Society.

Dr. Jonathan N. Katz is the Kay Sugahara Professor of Social Sciences and Statistics and the Chair of the Division of the Humanities and Social Sciences at the California Institute of Technology. He also is the Director of the Ronald and Maxine Linde Institute of Economic and Management Sciences. His research interests focus on American politics, political methodology (statistics applied to political science), and formal political theory. He is an elected fellow of both the American Academy of Arts and Sciences and the Society for Political Methodology. He has testified numerous times in state and federal court on using statistical analysis.

Dr. Gary King is the Albert J. Weatherhead III University Professor at Harvard University – one of 24 with the title of University Professor, Harvard's most distinguished faculty position. He is based in the Department of Government (in the Faculty of Arts and Sciences) and serves as Director of the Institute for Quantitative Social Science. Dr. King develops and applies empirical methods in many areas of social science research, focusing on innovations that span the range from statistical theory to practical application. Dr. King is an elected Fellow in 8 honorary societies (National Academy of Sciences 2010, National Academy of Social Insurance 2014, American Statistical Association 2009, American Association for the Advancement of Science 2004, American Academy of Arts and Sciences 1998, Society for Political Methodology 2008, American Academy of Political and Social Science 2004, and the Guggenheim Foundation 1994-95) and has won more than 40 "best of" awards for his work. His work on legislative redistricting has been used in most American states by legislators, judges, lawyers, political parties, minority groups, and private citizens, as well as the U.S. Supreme Court. His work on inferring individual behavior from aggregate data has been used in as many states by these groups, and in many other practical contexts. The statistical methods and software he develops are used extensively in academia, government, consulting, and private industry.

Dr. Tilman Klumpp is an Associate Professor of Economics at the University of Alberta, Canada,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Petitioner and of reversal.[1]

[1] All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination and compliance with federal Equal Employment Opportunity (EEO) and worker protection laws. Its membership comprises over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal workplace protection and nondiscrimination laws. In addition, virtually all of EEAC's members conduct business in multiple state jurisdictions and thus are also subject to many different state nondiscrimination and wage and hour laws. As large employers, they represent likely targets of broad-based employment class action litigation in both state and federal courts. Thus, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the proper interpretation and application of federal class certification procedural requirements to wage and hour claims.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondents are current and former hourly employees at Tyson Foods' Storm Lake, Iowa pork processing plant. Pet. App. 1a. In addition to their regular hourly wages, Respondents – who worked either on the "slaughter" or the "processing" floor – received additional pay for donning and doffing activities ("K-Code time"). Pet. App. 26a.

Respondents brought an action in federal court for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and Iowa Wage Payment Collection Law (IWPCL), Iowa Code §§ 91A.1 *et seq.*, accusing Tyson of failing to properly compensate its employees for overtime work. Pet. App. 5a, 26a-27a. Among other things, they claimed that the K-Code times were too low and did not cover the entire period of time needed to don and doff protective gear and to perform related activities. Pet. App. 5a, 27a. They moved to certify a Rule 23(b)(3) class and an FLSA collective action. *Id.*

Tyson opposed the motion, arguing that the claims of individual class members were not capable of resolution on a classwide basis, pointing out among other things that the types of jobs performed and the protective equipment required varied significantly

from person to person. Pet. App. 31a-32a. Rejecting Tyson's arguments, the trial court found the company's overall compensation system to be the "tie that binds" the class members' claims, warranting Rule 23(b)(3) certification, as well as conditional certification of an opt-in FLSA collective action. Pet. App. 32a.

After this Court decided *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), Tyson moved to decertify the Rule 23 class, renewing its argument that because Respondents' claims were not capable of classwide resolution "in one stroke," *id.* at 2551, they could not establish commonality. Pet. App. 32a. In response, Respondents produced expert testimony purporting to establish classwide liability and damages based on an estimation of the average time a small sample of employees spent on donning and doffing activities. *Id.* at 22a.

Tyson objected to what it characterized as a "trial by formula" approach to establishing common questions of liability and damages, an approach it argued was squarely foreclosed by *Dukes*. Pet. App. 10a, 11a. The trial court refused to decertify the class, concluding that whether "donning and doffing and/or sanitizing" protective gear "constitutes 'work'" was a question common to the class and susceptible to proof on a classwide basis. Pet. App. 37a.

At trial, Respondents' damages expert estimated that classwide damages were $6.6 million for the Rule 23 class and $1.6 million for the FLSA collective class, based on her assumption that every single member worked the purported "average" donning and doffing times. Pet. App. 124a-125a. She conceded, however, that over 200 class members never worked more than 40 hours in a given work week, and therefore were not entitled to any relief. Pet. App. 22a. Tyson's pretrial

motions for decertification and judgment as a matter of law were denied, Pet. App. 30a, and the jury eventually rendered a verdict for Respondents. Pet. App. 27a.

Tyson appealed to the Eighth Circuit, which in a 2-1 ruling affirmed. Pet. App. 1a, 14a, 24a. After its petition for rehearing *en banc* was denied by a 6-5 vote, Tyson filed a petition for a writ of certiorari, which this Court granted on June 8, 2015.

SUMMARY OF ARGUMENT

This Court's holdings in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), confirm that class certification under Rule 23 of the Federal Rules of Civil Procedure is impermissible where individual questions preclude "one stroke" resolution of liability and damages as to the class as a whole. *Dukes*, 131 S. Ct. at 2551. Because the panel majority below affirmed certification of a wage and hour class involving substantial individual questions of liability and damages incapable of classwide resolution, it contravened the class action principles clarified in both *Dukes* and *Comcast*. Accordingly, the decision below should be reversed.

In *Dukes*, this Court reversed certification of a class action brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, concluding that because the plaintiffs could not state a common injury that was capable of classwide resolution, they failed to satisfy the commonality requirements of Rule 23(a). 131 S. Ct. at 2553. It reiterated and clarified the general rule that plaintiffs must present "'significant proof' that every Rule 23 element has been satisfied, and the district court

must resolve any challenge to that evidence, prior to certifying a class. *Id.* at 2553-54. Those requirements are intended to comport with federal constitutional principles of due process designed, in part, to "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* at 2550 (citation and internal quotations omitted). The Court built on that concept in *Comcast*, confirming there that plaintiffs may not maintain a Rule 23(b)(3) class where they cannot point to a reliable means by which to measure and determine damages across the class.

Collectively, *Dukes* and *Comcast* reinforce that claims involving individualized questions of liability and damages – such as those arising frequently in the wage and hour context – are unsuitable for Rule 23 class certification. Wage and hour litigation often involves allegations that an employer failed to properly compensate an employee, or group of employees, for overtime worked. In order to maintain such claims as a class, however, the employees must demonstrate that common questions are susceptible to classwide *answers*. Given their inherently individualized nature, unpaid wages claims typically will involve far more complex and difficult questions of both liability and damages than Rule 23 will allow.

Improper certification of highly individualized wage and hour claims equips opportunistic plaintiffs and their attorneys with a powerful means of forcing settlement of even questionable claims. Indeed, the increasingly exorbitant costs associated with defending wage and hour class actions create enormous pressure on corporate defendants to settle. The larger a class, the greater the potential liability and defense costs, as well as the substantial risk of reputational damage among a company's employees, customers,

and federal government regulators like the Labor Department. Indeed, in light of current efforts to establish means by which to "blacklist" those with less-than-stellar labor law compliance records from doing business with the government, many employers are more wary than ever of "bet the farm" class litigation that could reflect poorly on their compliance efforts.

The panel majority below failed to adhere to this Court's admonitions both in *Dukes* and *Comcast* that the class action procedure is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Dukes*, 131 S. Ct. at 2550 (quoting *Yamasaki*). It follows that unless multiple claims can be resolved without resort to hundreds or thousands of individual trials on liability or damages, certification under Rule 23 is improper. The decision below disregards that rule, and if allowed to stand, will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims.

ARGUMENT

I. IN AFFIRMING CERTIFICATION OF A RULE 23 CLASS RIFE WITH INDIVIDUAL LIABILITY AND DAMAGES ISSUES, THE EIGHTH CIRCUIT DISREGARDED THE PRINCIPLES ELUCIDATED BY THIS COURT IN *DUKES* AND *COMCAST*

The Eighth Circuit affirmed certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and a collective action pursuant to Section 16(e) of the Fair Labor Standards Act (FLSA), 29

U.S.C. § 216b, despite substantial variations in the liability and damages claims of the individual plaintiffs. Because the decision below disregards the fundamental principles of class action law reinforced by this Court in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), reversal is warranted.

Federal court litigants seeking class certification generally must satisfy all four prerequisites of Federal Rules of Civil Procedure Rule 23(a), as well as the requirements of at least one subsection of Rule 23(b). Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) criteria consider whether conducting the case as a class action would be fair and efficient. For instance, Rule 23(b)(3) permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P 23(b)(3).[2]

The class action procedure is an exception to the "usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Comcast*, 133 S. Ct.

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[2] The Advisory Committee's Note interpreting Rule 23 conclusively states that where the "likelihood that significant questions, not only of *damages* but of *liability* and *defenses to liability*, would be present, affecting the individuals in different ways," class action certification under Rule 23(b)(3) is "not appropriate." Advisory Comm. Note, *reprinted in* 39 F.R.D. 69, 103 (1966) (emphasis added).

at 1432 (quoting *Yamasaki*). As this Court observed in *Dukes*:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

131 S. Ct. at 2551 (citations omitted). Therefore, parties seeking class certification carry the considerable burden of proving every element of Rule 23(a), and trial courts, which must undertake a "rigorous analysis" of the proffered evidence, often will be required to look beyond the pleadings in determining whether the class certification requirements have been satisfied.

A. *Dukes* Confirms That Rule 23(a) Commonality Requires That All Class Members Must Have Suffered A Common Injury Capable Of Classwide Resolution

In *Dukes*, a Title VII case, this Court held that in order to satisfy the requirements of Rule 23(a)(2), plaintiffs must demonstrate that there exists at least one question common to the class *that is capable of classwide resolution*, meaning "that determination of its truth or falsity will resolve an issue that is central

to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. For example, "the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." *Id.* Rather, in order for Rule 23(a)'s commonality requirement to be met, the individual class members' claims must rely on a common assertion, such as that they all were subjected to discrimination by the same biased supervisor. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution." *Id.* The Court reasoned:

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (citation omitted). *Dukes* thus confirmed that to justify certifying a class, the trial court must be satisfied that the answers to common questions will produce a result that applies to the class as a whole.

Here, Respondents were hourly workers assigned to Petitioner's Storm Lake, Iowa pork processing plant in its "Kill," "Cut," or "Retrim" department. Pet. App. 45a. It is undisputed that their job duties differed from department to department, and so too did the safety gear, or "Personal Protective Equipment (PPE)," they were required to wear. Pet. App. 46a. Naturally, differences in the actual equipment worn by individual employees resulted in many variances in the time required to don and doff that equipment

and perform related tasks, and hence in the compensation owed for doing so.

Brushing aside those individual considerations, the district court declined to decertify the class, reasoning that:

> [U]nlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility. If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs.

Pet. App. 37a.

Significantly, however, the district court failed to consider the critical *next* question, that is, whether proof of a nationwide compensation policy, coupled with a finding that the donning and doffing activities amounted to "work," would have been sufficient to establish *classwide* injury. The highly individualized proof required to determine each class member's entitlement to unpaid wages plainly precluded the generation of "common answers apt to drive the resolution of the litigation," *Dukes*, 131 S. Ct. at 2551 (citation omitted), making certification improper.

B. *Comcast* Confirms That A Rule 23(b)(3) Class May Not Be Certified Where No Reliable Means Exists For Measuring And Determining Classwide Damages

In *Comcast Corp. v. Behrend*, a 23(b)(3) case, this Court cautioned against certifying classes in which "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'"

133 S. Ct. 1426, 1433 (2013). *Comcast* involved allegations of anti-competitive business practices that resulted in customers having to pay more for cable service. Over Comcast's objections, the trial court certified a class as to a single theory of anticompetitive conduct, and a divided Third Circuit panel affirmed.

In reversing, this Court observed that because the class members were entitled to recover damages stemming only from the specific theory of anticompetitive conduct on which the trial court granted class certification, "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id.* If the model fails to do so, it cannot then be used to establish "that damages are susceptible of measurement across the entire class" as required by Rule 23(b)(3). *Id.*

This Court in *Comcast*, as well as in *Dukes*, thus firmly rejected the use of statistical sampling as a legitimate means of establishing either Rule 23(a) commonality or predominance under Rule 23(b)(3). As the Court explained in *Dukes*:

> The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules

> Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims.

Dukes, 131 S. Ct. at 2561 (citations omitted).

In fact, "trial by statistics died on June 20, 2011." Jay Tidmarsh, *Resurrecting Trial By Statistics*, 99 Minn. L. Rev. 1459 (2015). And for good reason. "Whatever its abstract merits, trial by statistics was ultimately doomed to die because it suffered from a fatal disease: it failed to allow the parties to submit individualized proof not only on the amount of injury but also – and this was the especially damning part – on the fact of injury." *Id.* at 1464.

Respondents offered expert testimony at trial purporting to establish the "average" time it took class members to perform donning and doffing activities. That average led to a final judgment against Petitioner in the amount of $5,785,757.40. Pet. App. 6a. Even though that judgment rested on questionable and unscientific sampling data, and it is undisputed that hundreds of class members suffered no injury at all, the panel majority nevertheless refused to decertify the class. It fully embraced Respondents' imprecise, "sample employee" approach, and in doing so disregarded this Court's admonitions in both *Dukes* and *Comcast*.

As Judge Beam pointed out in his dissent:

> Here we have undifferentiated presentations of evidence, including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages, ultimately resulting in a single-sum

> class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict. Assuming that the district court could now re-open the proceedings ..., the exercise would be laborious, virtually unguided, and well outside of the limiting parameters the Supreme Court has, as a matter of law, placed upon use of the Rule 23 class action machinery.

Pet. App. 24a (Beam, J. dissenting). This Court thus should hold that because no precise and accurate means existed to measure and determine damages as to the class as a whole, 23(b)(3) certification was improper here, and typically is improper in similar wage and hour cases.

> If a legal system must correct wrongs to individuals, as adherents to theories of corrective justice hold, then correctly determining a defendant's liability *en masse* is insufficient. Rather, the linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff. Except for the sampled cases, trial by statistics eliminates the proof on both sides of this connection: the defendant's causal act and the plaintiff's consequent injury.

99 Minn. L. Rev. at 1470-71 (footnote omitted); *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 979 (1988) ("[T]here is no legal obligation to confer a gratuitous benefit").

II. READ TOGETHER, *DUKES* AND *COMCAST* COMPEL THE CONCLUSION THAT CLAIMS FOR UNPAID WAGES INVOLVING HIGHLY INDIVIDUALIZED LIABILITY AND DAMAGES QUESTIONS ARE UNSUITABLE FOR CLASS TREATMENT

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc., v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). As the Eighth Circuit itself has observed, determining whether common questions predominate over individual ones:

> [R]equires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member. In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision.

Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) (citations omitted).

"An employee who brings suit under [the FLSA] for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 61 Stat. 84 (1947). It follows that individuals seeking Rule 23(b)(3) certification must be able to establish the elements of a threshold wage and

hour claim as to each class member, *i.e.*, whether each class member actually worked the requisite amount of overtime and was not properly compensated for doing so. Certification questions arise frequently in federal wage and hour litigation, which routinely involves highly individualized factual allegations that can vary significantly from plaintiff to plaintiff, so unsurprisingly "there is no reliable way to determine if an employee was paid for fewer hours than actually worked without examining each employee's individual time records and considering the employee's individual testimony." *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 536 (C.D. Cal. 2011).

Countless jobs exist for which time worked and compensation owed varies considerably from employee to employee:

- *Pizza delivery drivers*, *see Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 378 (8th Cir. 2013) ("The varied context of the transactions made it unreasonable for some customers to construe the delivery charge as a payment for personal services, thereby preventing one-stroke determination of a classwide question");
- *Home satellite technicians*, *see Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773-74 (7th Cir. 2013) ("[S]ome, maybe many, of the technicians may not work more than 40 hours a week and may even work fewer hours; others may work more than 40 hours a week. Variance would also result from different technicians' doing different tasks, since it's contended that the employer told them not to report time spent on some of those tasks, though – further complicating the problem

of proof – some of them reported that time anyway");

- *Nurses*, *see Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22, 50 (W.D.N.Y. 2014) ("District courts applying *Dukes* also have declined to certify Rule 23 class actions brought by nurses against health care facilities");
- *Insurance underwriters*, *see McKeen-Chaplin v. Provident Sav. Bank, FSB*, 21 Wage & Hour Cas. 2d (BNA) 1070, 2013 WL 5883794, at *3 (E.D. Cal. Oct. 30, 2013) ("[D]etermining whether all Underwriters actually worked overtime will require an individualized inquiry into the work schedules of each class member");
- *Service technicians*, *see Elder v. Comcast Corp.*, No. 12 C 1157, 2015 WL 3475968, at *9 (N.D. Ill. June 1, 2015) ("Ultimately, Plaintiffs have failed to establish by a preponderance of the evidence that there is a pattern to the frequency, manner or duration of home dispatch and home garage technicians' pre-shift and post-shift activities. In the absence of such a pattern, the court cannot fashion a common answer to the question of whether Plaintiffs actually worked pre-shift and post-shift work, which is a question central to Plaintiffs' claims"); and
- *Loss prevention managers*, *see Bradford v. CVS Pharmacy, Inc.*, No. 1:12-cv-1159-TWT, 2015 WL 4717312, at *3 (N.D. Ga. Aug. 7, 2015) ("The differences in the duties performed by the various Plaintiffs, as well as the varying

> degrees of discretion and independent judgment they each exercised, will make individualized inquiries inevitable when determining whether a particular FLSA defense applies").

In *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611 (2014), *appeal docketed*, No. 15-55361 (9th Cir. Mar. 6, 2015), for instance, a group of Costco store employees alleged that they were not compensated for post-shift time spent in lockdown while loss prevention and security protocols were implemented – a task they claimed could take from five to 60 minutes to complete. They asserted that Costco maintained an unwritten companywide policy of detaining employees during such procedures without compensation, in violation of the FLSA and California wage and hour laws.

As to the latter claims, the district court certified a statewide Rule 23(b)(3) class that included "[a]ll persons who worked for Costco Wholesale Corporation in California as hourly, non-exempt employees who were subject to Costco's closing lockdown procedures between May 15, 2005 and October 1, 2009." *Id.* at 614. At the close of evidence, Costco moved to decertify, arguing that the plaintiffs failed to present evidence sufficient to satisfy either 23(a) commonality or 23(b)(3) predominance.

Specifically, Costco contended that because lockdown procedures – and the extent to which employees were required to remain in store post-shift without being compensated – varied from store to store, liability could not be determined on a classwide basis. Agreeing, the district court decertified the class, concluding that "liability cannot be proved on a classwide basis without thwarting Costco's ability to demonstrate that some class members, due to a variety of circumstances, did not actually experience

unpaid OTC time despite being subjected to the Alleged Policy." *Id.* at 628.

Likewise, in *Espenscheid v. DirectSat USA, LLC*, the Seventh Circuit decertified a class comprised of 2,341 technicians responsible for installing and repairing home satellite dishes on the ground that each technician's individual situation was different, and "to determine damages would, it turns out, require 2341 separate evidentiary hearings ...." 705 F.3d 770, 773 (7th Cir. 2013). As the Seventh Circuit observed:

> [I]t's not as if each technician worked from 8 a.m. to 5 p.m. and was forbidden to take a lunch break and so worked a 45-hour week (unless he missed one or more days because of illness or some other reason) but was paid no overtime. Then each technician's damages could be computed effortlessly, mechanically, from the number of days he worked each week and his hourly wage. ... Nothing like that is possible here.

Id.

As in *Stiller* and *Espenscheid*, the certified class in this case comprises workers in various jobs, each with different safety equipment requirements. For example:

> Those employees wearing knives to use in conjunction with their particular duties on a particular day are required to wear a combination of a plastic belly guard, mesh apron, mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining the knives and knife scabbards ("knife-related gear"). Other workers are required to wear a hard hat, hairnet, beard net, earplugs,

> ear muffs, rubber or cotton gloves, and rubber or plastic aprons ("sanitary gear").

Pet. App. 21a (Beam, J., dissenting). Depending on the requirements of the particular job in question, those donning and doffing activities invariably took some employees more, and others less, time to accomplish.

The panel majority acknowledged that those differences would directly impact whether and to what extent Respondents were owed additional compensation above the K-Code time payment. It nevertheless concluded inexplicably that the complaint "is not dominated by individual issues such that the varied circumstances ... prevent 'one stroke' determination." Pet. App. 8a (citations and internal quotations omitted). Furthermore, "applying Tyson's K-Code policy and expert testimony to 'generate ... answers' for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)." *Id.*

To the contrary, Respondents "put the damages cart before the liability horse. *Mt. Clemens* first requires that an employee 'prove[] that he has in fact performed work for which he was improperly compensated.'" *Stiller*, 298 F.R.D. at 629. Respondents did not, and in fact could not, offer proof that the entire class as a whole suffered the same injury, and thus certification was improper. Improper certification resulted in the denial of Petitioner's right to assert individual defenses to liability, and thus failed to prevent a jury from awarding substantial monetary damages to the entire class – including those who suffered no harm at all.

III. PERMITTING THE AGGREGATION OF DISPARATE WAGE AND HOUR CLAIMS WOULD ARM THE PLAINTIFFS' BAR WITH A POWERFUL TOOL FOR FORCING EMPLOYERS INTO SUBSTANTIAL SETTLEMENTS HAVING LITTLE, IF ANYTHING, TO DO WITH THE UNDERLYING MERITS

This Court has said repeatedly that the class action procedure is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Dukes*, 131 S. Ct. at 2550 (quoting *Yamasaki*). The decision below does not adhere to that rule, and if allowed to stand, will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims.

A. Class-Based FLSA And State Wage-And-Hour Claims Have Increased Dramatically Over The Last Decade

Wage and hour litigation has morphed into a billion-dollar industry for the plaintiff's bar. Such claims not only have increased in number, but also in size and complexity. For instance:

> Despite the fact that the FLSA has been on the books for more than seventy years, in the last decade there has been an explosion of FLSA suits filed against employers. [In fact], the number of FLSA filings in federal court between the years 2000 and 2009 has more than tripled.
>
> * * *

> This dramatic rise in FLSA filings has not gone unnoticed by businesses. In October 2007, the proliferation of FLSA lawsuits even made the cover of Business Week, in an article aptly titled "Wage Wars." As the article notes:
>
> "No one tracks precise figures, but lawyers on both sides estimate that over the last few years companies have collectively paid out more than $1 billion annually to resolve these claims, which are usually brought on behalf of large groups of employees. What's more, companies can get hit again and again with suits on behalf of different groups of workers or for alleged violations of different provisions of a complex tapestry of laws."

William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and A Proposal for Reform*, 19-SPG Kan. J.L. & Pub. Pol'y 433, 433-34 (Spring 2010) (citation and footnote omitted).

The number of FLSA lawsuits filed in federal court has shot up more than 300% over the last decade, and more than 500% over the last two decades. U.S. Gov't Accountability Office, GAO-14-69, FAIR LABOR STANDARDS ACT: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance 6-7 (2013). Of those, fully forty percent assert class-based claims. *Id.* at 16. According to a recent U.S. Government Accountability Office (GAO) report, a driving force behind the rise is the increased interest by plaintiffs' attorneys in bringing wage and hour claims, which they find easier to handle and prove than other types of employment-related lawsuits. *Id.* at 10.

The likelihood of employers being caught unawares in this wage and hour litigation wave is not remote by any measure. As one commentator described it:

> [T]he federal dockets in Florida and several other states have been inundated with wage and hour collective action complaints. In fact, the continuous filing of wage and hour class/collective actions [has] resulted in the judges in the United States District Court for the Middle District of Florida implementing special FLSA Scheduling Orders just to be able to sort potentially viable or meritorious claims from the purely frivolous claims. The same court implemented a Standing Order preventing one particular wage and hour firm from even filing any more cases without leave of the court itself. And, furthermore, federal courts across the country have been forced to discipline numerous of these wage and hour firms for continued solicitation of putative collective action members—who in many cases remain members of the defendant corporation's active workforce.

Christopher M. Pardo, *The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery*, 10 J. Bus. & Sec. L. 1, *10–*11 (2009) (footnotes omitted).

Litigation is likely to further increase in light of efforts by the government to tie the award of federal contracting dollars directly to compliance with state and federal labor laws. Signed by President Obama on July 31, 2014, Executive Order No. 13,673 requires covered employers bidding on federal contracts valued at more than $500,000 to disclose various labor law violations over a three-year period – across twelve federal labor and employment statutes, including the FLSA – and, if a contract is awarded, to update this

information every six months during the performance of the contract. 79 Fed. Reg. 45,309 (Aug. 5, 2014). That obligation also extends to employers bidding on *subcontracts* valued at more than $500,000; they must disclose to the first-tier contractor any labor law violations from the past three years and, if a subcontract is awarded, update this information every six months during the performance of the subcontract.

It is entirely conceivable that plaintiffs could begin to file administrative complaints or proposed class actions for the purpose of leveraging a potential adverse finding by the Labor Department or ruling by a trial court – both of which would be considered reportable "violations" under Exec. Order No. 13,673 – in order to force a favorable settlement.

B. Class Certification Often Leads To Settlement, Even Of Entirely Defensible Claims

This proliferation (actual and anticipated) of class-based wage and hour litigation has placed employers at great financial risk, both in terms of the substantial fees associated with merely defending such claims, as well as the frequently exorbitant cost to resolve them. A trial court's certification of a class alone can "coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit...." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (citations omitted). This pressure to settle tends to increase in direct proportion to the "magnitude of the potential damages." *Id.*

Indeed, aggregating wage and hour claims for those purposes is a low-risk, high-reward proposition for plaintiffs' counsel. "While the plaintiffs' attorney has to incur the costs of filing the class action lawsuit and

has to invest a substantial amount of time that could potentially be wasted if the class is not certified, once the class *is* certified, in the majority of cases the defendant will settle ...." Steven Bolanos, *Navigating Through the Aftermath of* Wal-Mart v. Dukes*: The Impact of Class Certification, and Options for Plaintiffs and Defendants*, 40 W. St. U. L. Rev. 179, 183 (Spring 2013) (footnote omitted) (emphasis added). This Court has acknowledged that reality, observing:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail ....

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011). Improper certification of employment class actions generally, and wage and hour classes in particular, ignores the fact that certification frequently leads to a settlement, even in cases of questionable merit:

> Once the class is certified, because of the destructive capability of an unfavorable judgment, the pressure on defendants to settle is irresistible and defendants 'always' settle. Because of this 'automatic' or 'guaranteed settlement' after a class is certified, the certification process becomes the most important part of the case and the 'only avenue for a court to rule in a way that is relevant to the ultimate outcome of the case.' However, certification decisions are based on federal or state procedural rules and are almost completely

> unrelated to the merits of the case. It is this procedure-based method of certification that leads to inequity for defendants, who are likely to settle after certification even when they might have a strong case on the merits.

Bolanos, 40 W. St. U. L. Rev. at 183 (footnotes omitted); *see also* Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird with Two Stones: The Use and Abuse of Class Actions and Collective Actions in Employment Litigation*, 31 Hofstra Lab. & Emp. L.J. 387, 405-06 (2014) ("Class actions are extremely popular and [a] heavily-used means of pursuing employment litigation because Plaintiffs, and their class action attorneys, often see class actions as an easy way to maximize damages while minimizing effort: Certification as a class action can coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit").

By limiting the reach of *Dukes* and *Comcast* and allowing highly individualized claims to form the basis for class certification, the Eighth Circuit all but ignored the reality that class certification almost invariably leads to a settlement. Permitting plaintiffs to aggregate hundreds or thousands of claims without having to satisfy all the required elements of Rule 23 will lead to the class action device being used not in the limited manner in which it was intended, but rather as a strategic and opportunistic means of extracting settlements from employers wishing to avoid the financial and commercial risk associated with classwide litigation.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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TYSON FOODS, INC.,
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v.
PEG BOUAPHAKEO, ET AL.,
RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF ILLINOIS, CONNECTICUT, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, PENNSYLVANIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage-and-hour violations arising out of an employer's failure properly to compensate employees for time spent donning and doffing protective equipment and walking between sites where work was performed, the district court abused its discretion in granting certification where plaintiffs proceeded to prove the amount of work they did using individual timesheet evidence and representative proof concerning donning, doffing, and walking times in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a class or collective action may be certified when it contains members who may not have been injured.

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INTEREST OF THE AMICI

The Amici States have a vital interest in this case, which could negatively affect their ability to ensure effective and robust wage-and-hour law enforcement for their residents. The States' wage-and-hour regulation is part of a dual, public-private enforcement scheme, in which both government agencies and private litigants bring wage claims on behalf of unpaid and underpaid workers. Petitioner, however, would weaken this well-established enforcement scheme by limiting workers' ability to bring collective and class actions to recover unpaid wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and comparable state laws in situations where employers have failed to keep accurate records of the hours worked by their employees.

More specifically, Petitioner seeks to significantly limit this Court's decision in *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680 (1946), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84, and the seven decades of state and federal case law relying on it. *Mt. Clemens* addressed the appropriate burdens of proof when an employer has not kept the statutorily required records of the hours its employees have worked. Rather than requiring that each employee produce evidence establishing precisely the number of hours worked, which the employer's own failure to keep records has made impossible, this Court established a burden-

shifting test which permits an employee to rely on representative proof, *Mt. Clemens*, 328 U.S. at 687-88, such as testimony of individual employees or expert time studies, to prove liability and damages for unpaid wages.

This case involves the relevance of *Mt. Clemens* to class or collective actions to recover unpaid wages. Petitioner's position is that because individual employees may well have worked different amounts of time, there is a lack of "predominance," as required by Rule 23, and so a class or collective action cannot be brought. Pet. Br. at 29-32. More specifically, Petitioner suggests that the burden-shifting framework of *Mt. Clemens* cannot be relied on to provide the common evidence necessary to establish predominance. *Id.* at 40-44. Petitioner's view would significantly weaken effective enforcement not only of the federal FLSA, but also of state wage-and-hour laws, which are often enforced as companion claims in FLSA lawsuits—and it could have implications far beyond this area of law.

Limiting class and collective actions as Petitioner suggests would affect the Amici States in three principal ways. First, limiting class and collective actions would weaken private wage law enforcement which, in turn, would place significant additional burdens on already under-resourced government enforcement agencies—which were never intended to bear the weight of enforcing these laws alone. Second, limitations on private enforcement of the FLSA and of state wage laws

in federal court would remove the backdrop of robust private enforcement of the FLSA against which States' laws, procedures, and administrative entities, have developed, disrupting settled expectations about how state law and federal law interact in this area. Finally, Petitioner's view would create incentives for employers not to keep statutorily required records, which would in turn hamper the enforcement of not only wage-and-hour laws, but also a variety of other laws.

For these reasons, the Amici States respectfully submit this brief in support of Respondents.

SUMMARY OF ARGUMENT

Circumscribing the applicability of the long-established *Mt. Clemens* burden-shifting framework as Petitioner urges will weaken the carefully crafted enforcement scheme for federal and state wage-and-hour laws. Both the federal FLSA and numerous state wage-and-hour laws rely on the public-private enforcement scheme by which essential employee protections are safeguarded through vigilant enforcement by government agencies as well as private parties. But if employees are not able to use representative evidence to establish the necessary conditions for class or collective actions in federal court, the efficacy of private enforcement will be damaged, and government agencies are not equipped to adequately enforce these important protections by themselves. And not only would many wage-and-hour protections, which remain vital more than seventy-five years after the

FLSA's passage, be inadequately enforced, but employers would be rewarded for violating other statutory provisions requiring that they keep complete and accurate records. This Court long ago adopted the *Mt. Clemens* framework, which addresses situations where employers do not keep adequate records, to enable meaningful enforcement of wage-and-hour standards. Petitioner's effort to undermine decades of well-reasoned reliance on *Mt. Clemens* should be rejected.

ARGUMENT

I. State Wage Laws Build on the FLSA, and Both Rely on a Public-Private Enforcement Scheme in Which Class and Collective Actions are Critical.

State wage-and-hour laws predate the FLSA, and since the FLSA's enactment, also build upon it. As wage-and-hour violations continue to be prevalent and negatively affect States' budgets and economic conditions, effective enforcement is critical. Both federal and state wage-and-hour laws rely heavily on private lawsuits as part of their enforcement regime, and class and collective actions are central to the availability and effectiveness of such private lawsuits.

A. Federal and State Wage Laws Are Intertwined.

States have regulated wages paid and hours worked for more than a century. Massachusetts passed the first minimum wage law in 1912, and by 1923 an additional 14 States followed suit, passing legislation that set a minimum hourly wage or maximum number of work hours (or both).[1] *See* Frank T. DeVyer, *Regulation of Wages and Hours Prior to 1938*, 6 L. & CONTEMP. PROBS. 323, 327 (1939). By 1937, 25 States had enacted laws establishing some kind of minimum wage. *Id.* at 329.

In passing these laws, States were responding to significant developments in the economy and labor market. As increased industrialization took hold, child labor, sweatshop conditions, and inadequate wages were

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[1] Several of these early wage laws were struck down by this Court on the grounds that state legislatures could not constitutionally interfere with private contracts between employers and employees. *See, e.g., Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating the District of Columbia's minimum wage law); *Morehead v. People ex rel. Tipaldo*, 298 U.S. 587, 609 (1936) (striking a New York State minimum wage law). In 1937, however, the Court revisited these decisions and upheld a Washington law that established a minimum wage for women and children. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). That States continued to enact such laws even when their constitutionality was regularly challenged is a measure of those laws' importance to the States.

commonplace.[2] This, in turn, led to a segment of the population that, although employed, nonetheless lived in poverty and often depended upon public assistance to meet the requirements of daily living.[3] Indeed, this Court took judicial notice of the "unparalleled demands for relief" that arose during the Great Depression, expressed concern that "what these workers lose in wages the taxpayers are called upon to pay," and concluded that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers." *W. Coast Hotel*, 300 U.S. at 399.

Congress responded as well, passing the FLSA in 1938 to remedy conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being

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[2] Bruce Goldstein, Marc Linder, Laurence E. Norton, II, and Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1055-1061 (1999); *see also* Jonathan Grossman, *Maximum Struggle for a Minimum Wage*, (providing comprehensive history of events and social conditions leading to passage of FLSA) *available at* www.dol.gov/dol/aboutdol/history/flsa1938.htm (last visited September 28, 2015).

[3] "From the period 1912 to 1920, large city welfare outlays increased 79 percent, and most cities began actively reorganizing local welfare departments." Kirk J. Stark, City Welfare: Views from Theory, History, and Practice, 27 URB. LAW. 495, 515 (1995) (citing MICHAEL KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 154-56 (1986)).

of workers." 29 U.S.C. § 202.[4] The FLSA establishes a minimum hourly wage and mandates payment of overtime to covered employees, among other things. 29 U.S.C. §§ 206, 207. It also requires employers to keep records of the hours their employees work. *Id.* § 211(c); *see also* 29 C.F.R. §§ 516.2(a)(7), 516.6(a)(1).

The FLSA relies on both governmental and private enforcement. Section 204 establishes the Wage and Hour Division within the United States Department of Labor (USDOL). 29 U.S.C. § 204. Section 216(c) empowers the Secretary of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime" and to bring actions in federal court to enforce the provisions of the Act. *Id.* § 216(c). And the FLSA also authorizes private lawsuits by employees who have not been paid minimum wage or overtime. *Id.* § 216(b).

In addition, from the outset, the FLSA authorized those private lawsuits to be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Id.* § 216(b). Thus, long before Federal Rule of Civil Procedure 23 was amended in 1966 to allow for class actions as currently understood, 39 F.R.D. 69, 95-107

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[4] *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L & CONTEMP. PROBS. 464, 464-72 (1939); Grossman, *supra* note 2.

(1966), the FLSA provided that groups of employees could sue to recover illegally unpaid wages.

The FLSA also allowed the States to maintain their important role as primary regulators of employment-related matters, explicitly providing that the FLSA merely sets the floor for wage-and-hour regulation and that States may impose more stringent laws. *See* 29 U.S.C. § 218(a). As a result, since the passage of the FLSA, States have remained actively involved in wage-and-hour regulation. Forty-one States and the District of Columbia have statutes or regulations that, like the FLSA, require employers to maintain accurate records of the time worked by employees and the wages paid to employees.[5] Approximately 29 States and the District of

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[5] Alaska Stat. § 23.10.100; Ariz. Rev. Stat. Ann. § 23-364(D); Ark. Code Ann. § 11-4-217; Cal. Lab. Code § 1174; CO Wage Order 31, 7 C.C.R. 1103-1:12; Conn. Gen. Stat. § 31-66; Del. Code Ann. tit. 19, § 907; Ga. Code Ann. § 34-4-5; Haw. Rev. Stat. § 387-6; Idaho Code Ann. § 45-610; 820 Ill. Comp. Stat. 105/8; Iowa Code § 91A.6; Kan. Stat. Ann. § 44-1209; Ky. Rev. Stat. Ann. § 337.320; La. Rev. Stat. Ann. 23:1660; Me. Rev. Stat. tit. 26, § 622; Md. Code Ann., Lab. & Empl. § 3-424; Mass. Gen. Laws ch. 151, § 15; Mich. Comp. Laws § 408.479; Minn. Stat. § 177.30; Mo. Rev. Stat. § 290.520; Mont. Admin. R. 24.16.6102; Nev. Rev. Stat. § 608.115; N.H. Rev. Stat. Ann. § 279:27; N.J. Admin. Code § 12:56-4.1; N.M. Stat. Ann. § 50-4-9; N.Y. Lab. Law § 195; N.C. Gen. Stat. § 95-25.15; Ohio Rev. Code Ann. § 4111.14; Okla. Admin. Code 380:30-3-3; Or. Rev. Stat. § 653.045; 34 Pa. Code § 231.31; R.I. Gen. Laws § 28-12-12; S.C. Code Ann. § 41-10-30; Utah Code Ann. § 34-28-10; Vt. Stat. Ann. tit. 21, § 393; 16 Va. Admin. Code 5-32-10; Wash. Rev. Code § 49.46.070; W. Va. Code § 21-5C-5; Wis. Stat. Ann. §

Columbia have established minimum wages higher than the federal minimum.[6] Some States have also enacted overtime laws that are more protective than the FLSA—requiring, for example, payment of time and one-half an employee's normal hourly wage for hours worked in excess of a certain number in a day.[7] Many States have also enacted protective wage laws requiring meal and rest breaks for at least some workers, an issue that the FLSA does not address.[8] And some States have chosen to concentrate their state law protections and resources only or largely on workers who are outside the FLSA's scope,[9] or not to regulate wages and hours at

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104.09; Wyo. Stat. Ann. § 27-4-203; D.C. Code § 32-1008.

[6] For a comprehensive map and listing of state minimum wage requirements, *see* MINIMUM WAGE LAWS IN THE STATES, UNITED STATES DEPARTMENT OF LABOR, *available at* http://www.dol.gov/whd/minwage/america.htm (last updated Jan. 1, 2015) (last visited September 28, 2015).

[7] *See* Alaska Stat. 23.10.060; Cal. Lab. Code § 510; CO Wage Order 30, 7 CCR 1103-1; Nev. Rev. Stat. § 608.018.

[8] *See, e.g.*, Alaska Stat. § 23.10.350; Cal. Lab. Code § 512; 7 CO Wage Order 31, 7 C.C.R. 1103-1; Conn. Gen. Stat. § 31-51ii; Del. Code Ann. tit. 19 § 707; Fla. Stat. § 450.081(4); 820 Ill. Comp. Stat. 140/3; Iowa Code 92.7; Md. Code Ann., Lab. & Empl.§ 3-210; Mass. Gen. Laws Ch. 149, § 100; Mich. Comp. Laws § 409.112; Minn. Stat. §§ 177.253, 177.254; Nev. Rev. Stat. § 608.019; N.Y. Lab. Law § 162; Or. Rev. Stat. § 653.261; Tenn. Code Ann. § 50-2-103 (h).

[9] *See, e.g.*, Kan. Stat. Ann. § 44-1203(c); 40 Okla. Stat. Ann. § 197.4(d); Tex. Lab. Code § 62.151; Va. Code Ann.

all,[10] thus relying exclusively on the FLSA and its enforcement structure to protect workers covered by federal law.

Also like the FLSA, state wage laws generally establish a private-public enforcement scheme. Almost all States have Departments of Labor (or Divisions of Labor Standards) that accept and investigate complaints of unpaid minimum or overtime wages.[11] State Attorneys General also play a critical role in wage-and-hour enforcement by representing the state labor departments in court to defend their findings; some Attorneys General also exercise independent statutory authority to address wage-and-hour violations.[12] In

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§ 40.1-28.9(B)(12); *see also, e.g.*, Ga. Code Ann. § 34-4-3(c) (minimum wage law does not apply to FLSA-covered workers unless state minimum wage exceeds federal minimum wage); Mich. Comp. Laws § 408.420 (same).

[10] *See supra* note 6.

[11] *See* JACOB S. MEYER & ROBERT GREENLEAF, NAT'L ST. ATT'Y GEN. PROGRAM, COLUMB. L. SCH., ENFORCEMENT OF STATE WAGE AND HOUR LAWS, A SURVEY OF STATE REGULATORS 177-94 (April 2011), *available at* http://web.law.columbia.edu/attorneys-general/policy-areas/labor-project/resources/state-and-hour-laws (follow "Full Report" hyperlink) (last visited September 28, 2015).

[12] *Ibid.*; Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 512-513 (2006).

addition, 40 States and the District of Columbia have laws that provide for a private right of action to obtain unpaid minimum wages and overtime.[13]

Moreover, private wage-and-hour lawsuits brought in federal court, as in this case, often include claims for violations of state law, which may have different remedies or statutes of limitation than the FLSA. *See, e.g., Garcia v. Tyson Foods*, 770 F.3d 1300, 1305 (10th Cir. 2014) (claims brought under the FLSA, which provides at most for double damages, and Kansas Wage Payment Law § 44-314 and 44-315, which provides for

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[13] Alaska Stat. § 23.10.110(a); Ariz. Rev. Stat. Ann. § 23-364; Ark. Code Ann. § 11-4-218; Cal. Lab. Code § 1197.5; Colo. Rev. Stat. § 8-6-118; Conn. Gen. Stat. § 31-68; Del. Code Ann. tit. 19, § 911; Fla. Stat. § 448.110(6)(a); Ga. Code Ann. § 34-4-6; Haw. Rev. § 387-12(b); Idaho Code Ann. § 44-1508; 820 Ill. Comp. Stat. 105/12; Ind. Code Ann. § 22-2-2-9; Kan. Stat. Ann. § 44-1211; Ky. Rev. Stat. Ann. § 337.385; Me. Rev. Stat. tit. 26, § 670; Md. Code Ann., Lab. & Empl. § 3-426(a)(1); Mass. Gen. Laws ch. 151, § 20; Mich. Comp. Laws § 408.419(1)(a); Mo. Rev. Stat. § 290.527; Mont. Code Ann. § 39-3-407; Neb. Rev. Stat. § 48-1231; Nev. Rev. Stat. § 608.260; N.H. Rev. Stat. Ann. § 279:29; N.J. Stat. Ann. § 34:11-56a25; N.M. Stat. Ann. § 50-4-26; N.Y. Lab. Law § 663; N.C. Gen. Stat. § 95-25.22; N.D. Cent. Code § 34-14-09; Ohio Rev. Code Ann. § 4111.14; Okla. Stat. tit. 40, § 197.9; Or. Rev. Stat. § 653.055; 43 Pa. Stat. Ann. § 333.113; R.I. Gen. Laws § 28-12-19; Tex. Labor Code Ann. § 62.203; Utah Code Ann. § 34-40-205; Vt. Stat. Ann. tit. 21, § 395; Va. Code Ann. § 40.1-28.12; Wash. Rev. Code § 49.46.090; W. Va. Code § 21-5C-7; Wyo. Stat. Ann. § 27-4-204(a); D.C. Code § 32-1012; *see also* MEYER & GREENLEAF, *supra* note 11.

damages of 1% of the unpaid wage amount for every day wages are not paid). These state claims are often brought as Rule 23 class actions alongside FLSA collective actions. *See, e.g., ibid.*; *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003) (bringing claims under FLSA and Washington meal and rest break law), *aff'd*, 546 U.S. 21 (2005). Thus, the restrictions Petitioner seeks on both class and collective actions would have a significant negative impact on effective private enforcement of state law. Indeed, in the absence of viable private lawsuits enforcing both state and federal law, the only way for large groups of workers to obtain the same relief currently available through these hybrid cases would be a USDOL enforcement action coupled with state-level enforcement, which would—at best—create significant inefficiencies. More likely, workers simply would not obtain all the relief they are entitled to under at least one of the regulatory regimes, if not both. And for workers who are not covered by state law, meaningful private enforcement would be largely unavailable.

In addition, federal law involving the FLSA has long served as persuasive authority in interpreting state wage-and-hour law. Illinois courts, for example, have relied on "the underlying purposes and public policy of the federal and state statutes" to find that "federal cases interpreting the FLSA, while not binding on this court, are persuasive authority and can provide guidance in interpreting issues under the [Illinois] Wage Law and the Wage Payment Act." *Lewis v. Giordano's*

Enters., Inc., 921 N.E. 2d 740, 776 (Ill. App. Ct. 2009). Many state courts have similarly noted that where the substance and remedial intent of a state wage law is consistent with the FLSA, it is appropriate to consider federal cases interpreting the comparable federal statutory provisions. *See, e.g., In re United Parcel Serv. Wage & Hour Cases*, 190 Cal. App. 4th 1001, 1028 (2d Div. 2010) (federal law interpreting similar provisions under FLSA are considered instructive); *Anderson v. State, Dep't of Soc. & Health Servs.*, 63 P.3d 134, 135 (Wash. Ct. App. 2003) (courts may look to federal law regarding the FLSA as persuasive authority on issues of overtime raised pursuant to state Minimum Wage Act); *Quinn v. Alaska State Employees Ass'n. Fed'n of State, Cnty. & Mun. Employees, Local 52*, 944 P.2d 468, 470 n. 3 (Alaska 1997) (when the Alaska Wage and Hour Act does not define a term and additional analysis is required, Alaska courts must look to federal regulations and then to federal case law interpreting the FLSA). Thus, although state courts enforcing state law are generally not bound by federal courts' interpretations of the FLSA, *but see, e.g.*, Mo. Rev. Stat. § 290.505(4) (providing that Missouri overtime provision be interpreted "in accordance with" FLSA); Tex. Lab. Code § 62.051 (providing that covered employers pay minimum wage as established by FLSA), and state and federal wage law standards may differ, as a practical matter, federal case law related to the FLSA has a significant impact on state courts' interpretation and enforcement of their own wage-and-hour laws.

B. Wage Law Enforcement Continues to be Vital Today Because Wage-and-Hour Violations Remain Pervasive.

More than seventy-five years after the passage of the FLSA, the need for strong wage-and-hour enforcement remains critical, as employer noncompliance with such laws is high, particularly for low-wage workers.[14] For example, in a comprehensive survey of 4,387 "front-line workers" in low-wage industries in Chicago, Los Angeles, and New York, a quarter of the workers surveyed reported working more than 40 hours per week, but 76% of those workers also reported that they were not paid the required overtime for those hours. ANNETTE BERNHARDT, ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 20 (2009).[15] Additionally, 26% of the workers surveyed had

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[14] For additional resources on the prevalence of employer non-compliance with overtime, minimum wage, and other protective wage laws, *see* Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L.J. 851 (2015); KIM BOBO, WAGE THEFT IN AMERICA (2009); STEVEN GREENHOUSE, THE BIG SQUEEZE (2008); DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT (2010); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373 (2008).

[15] The study characterizes a "front-line" worker as someone other than a manager, professional or technical worker. BERNHARDT, ET. AL., BROKEN LAWS, UNPROTECTED WORKERS, at 12.

been paid less than minimum wage during the time period surveyed. *Id.* at 2. In total, the average full-time, front-line worker earning $17,616 per year lost $2,634 or 15% of her yearly income due to legally required but unpaid wages withheld by her employer. *Id.* at 5.

Statistics on wage complaints and recoveries also help quantify the scale of wage-and-hour violations. The United States Department of Labor has received between 22,000 and 32,000 complaints of minimum wage and overtime violations every year for the last five fiscal years.[16] And there are undoubtedly many more violations than actual complaints or lawsuits filed. *See* David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 77-78 (2005) (estimating that there are 130 employees paid in violation of FLSA overtime provision for every complaint investigated by the USDOL).

Even though many wage-and-hour violations go unreported and uninvestigated, hundreds of millions of dollars are recovered every year on behalf of underpaid workers. In 2012, for example, the USDOL obtained

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[16] U.S. Dep't of Labor, Wage and Hour Division Enforcement Statistics, *available at* http://www.dol.gov/whd/statistics/statstables.htm (last visited September 28, 2015).

$280 million on behalf of such employees.[17] That same year, enforcement agencies in 44 States recovered $172 million and state Attorneys General in 45 States recovered $14 million.[18] Private wage settlements recovered $467 million nationally that same year.[19] Together, these recoveries total over $900 million for just one year, without even factoring in state and federal court *judgments* obtained by employees.

The widespread noncompliance with wage laws evidenced by these numbers not only harms low-wage workers, but also negatively affects States' economies and budgets. When employees lose 15% of the wages that they have earned and are statutorily owed, that is money that they cannot spend or invest in their local community,[20] and governments at all levels lose tax

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[17] *Ibid.*; BRADY MEIXAL AND ROSS EISENBRY, ECONOMIC POLICY INSTITUTE, AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2, (September 2014), *available at* http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ (last visited September 28, 2015).

[18] *Ibid.*

[19] *Ibid.* (citing DENISE MARTIN, STEPHANIE PLANCICH, & JANEEN MCINTOSH, NERA ECONOMIC CONSULTING, TRENDS IN WAGE AND HOUR SETTLEMENTS: 2012 UPDATE (2013)), *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_Wage_and_Hour_Settlements_0313.pdf.) (last visited September 28, 2015).

[20] RUTH MILKMAN, ANNA LUZ GONZALEZ, & VICTOR NARRO, INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT,

revenues from that unpaid income and consequent lower spending. At the same time, a recent study demonstrated that between 2009 and 2011, more than half of state and federal spending on certain public assistance programs went to low-wage working families.[21] The Amici States' interest in a comprehensive effective wage law enforcement structure that safeguards employee earnings and, in turn, protects the States' economies and budgets, thus remains as vital today as it was in the early twentieth century.

UNIVERSITY OF CALIFORNIA, LOS ANGELES, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 53 (2010). "[L]ow-wage workers are more likely than any other income group to spend any extra earnings immediately on previously unaffordable basic needs or services." DAVID COOPER AND DOUGLASS HALL, ECONOMIC POLICY INSTITUTE, RAISING THE FEDERAL MINIMUM WAGE TO $10.10 WOULD GIVE WORKING FAMILIES, AND THE OVERALL ECONOMY, A MUCH-NEEDED BOOST, 9 (March 13, 2013), *available at* http://www.epi.org/files/2013/IB354-Minimum-wage.pdf (last visited September 28, 2015).

[21] KEN JACOBS, IAN PERRY, & JENNIFER MACGILLVARY, UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, THE HIGH PUBLIC COST OF LOW WAGES 2 (April 2015), *available at* http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf (last visited September 28, 2015). In Illinois, for example, from 2009 to 2011, the annual cost to the State of providing Medicaid, the Children's Health Insurance Program, and TANF benefits to working families is $1.098 billion. *Id.* at 8, Table 6. *See ibid.* (listing such statistics for all States).

C. States Depend on Private Attorneys General to Enforce Wage-and-Hour Laws.

Employees who believe that they have been underpaid in violation of the FLSA or comparable state laws generally have the right to file complaints both with the USDOL and with state labor agencies. But these administrative agencies simply do not have sufficient resources to fill the enforcement gap that would be created were private enforcement severely curtailed. Of the more than $900 million recovered for workers in 2012 (not including actual judgments in their favor in private lawsuits), half of that amount was the result of private lawsuits. *See supra* notes 17 and 19. And of the 8,148 FLSA lawsuits filed in 2012,[22] 3,260, or 40%, of the suits were private collective actions.[23] Each of these private collective actions typically represents hundreds, if not thousands, of individual wage claims.[24]

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[22] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: DEPARTMENT OF LABOR NEEDS A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE, TESTIMONY BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS 3 (July 23, 2014), *available at* http://gao.gov/assets/670/664949.pdf (last visited September 28, 2015).

[23] *Id.* at 5, Figure 2.

[24] *See generally* Craig Becker, Paul Strauss, *Representing Low-Wage Workers in the Absence of A Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the*

Assuming conservatively that the average FLSA collective action involves 200 covered employees, that would translate to 652,000 individual wage claims. And this calculation does not account for many state law claims that have been aggregated into class actions.

Without a class or collective action to aggregate these claims, these private wage claims would have to be filed through individual private suits or brought by individual complaint by or to a state enforcement agency or the USDOL. Neither the courts nor public labor agencies are in a position to effectively handle this volume of wage claims. And Congress certainly has not intended for the USDOL to do so. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 (2012) ("Over time, Congress increased incentives for private suit under the FLSA, while simultaneously limiting funding for the [USDOL], which, as a consequence, decreased significantly its own FLSA enforcement efforts.") (internal citations omitted). Likewise, state enforcement efforts have been funded and structured with the knowledge that private lawsuits

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Underenforcement of Minimum Labor Standards, 92 MINN. L. REV. 1317, 1336-37 (2008) (discussing wage and hour class and collective actions involving "hundreds or thousands of opt-in plaintiffs"); Andrew C. Brunsden, Hybrid Class Action, *Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 2, 269, 292-93 (2008) (documenting FLSA collective action plaintiff sizes as high as 2,300).

can be brought. Either together or separately, federal and state agencies cannot come close to fully enforcing wage-and-hour laws and ensuring that workers receive the pay they are entitled to.

The USDOL, for example, has very limited resources. From 1974 to 2004, the number of investigators in the USDOL Wage and Hour Division decreased by around 14%, while the number of covered workplaces grew by 55%.[25] While the Division has hired additional inspectors in recent years,[26] this increased staffing merely brings the agency closer to historic staffing levels. Moreover, the Division cannot realistically take on responsibility for comprehensive enforcement. Not only does it receive more than 22,000

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[25] David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J 59, 62 (2005); ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUST., ECONOMIC POLICY BRIEF NO. 4, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR 1975-2004 2 (2005).

[26] *E.g.*, Press Release, Statement by U.S. Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts (Nov. 13, 2009) ("I have hired an additional 250 wage-and-hour investigators."), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited September 28, 2015).

complaints a year,[27] but the annual probability of a U.S. Department of Labor inspection of one of the seven million workplaces covered by the FLSA is well below 0.1%.[28]

State agencies are similarly underresourced. In a 2011 survey of state wage-and-hour enforcement, many state agencies reported that they receive thousands of complaints of unpaid wages from workers each year.[29] Yet, of the 37 States responding to the survey, only six had more than 30 full time employees devoted to wage-and-hour enforcement, and a majority of states had fewer than 15 full time employees to investigate those thousands of complaints.[30] Furthermore, a majority of the surveyed States had seen budget cuts and reductions in staff in recent years.[31] And while a handful of States reported strong wage law enforcement,[32] others reported not having an agency

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[27] *See* United States Department of Labor Wage and Hour Division statistics, *available at* http://www.dol.gov/whd/statistics/statstables.htm (last visited September 28, 2015).

[28] *See* Weil & Pyles, *supra*, 27 COMP. LAB. L. & POL'Y J. at 77-78.

[29] MEYER & GREENLEAF, *supra* note 11, at 98-106.

[30] *Id.* at 73-80.

[31] *Id.* at 22.

[32] *Id.* at 16.

that "engages in any meaningful enforcement of wage and hour standards" at all.[33] States, like the federal government, thus depend on private actors to supplement governmental efforts to combat wage violations.[34] Without private litigation, wage-and-hour laws will be enforced even more unpredictably than they already are.

D. Class and Collective Actions Are Critical to the Ability of Workers to Bring Private Lawsuits.

Not only are FLSA and state wage laws enforced in large measure through private enforcement schemes, but those schemes specifically provide that wage-and-

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[33] *Ibid.*; *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1114 (2012) (citing Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 443 (2011)).

[34] *See* Glover, 53 WM. & MARY L. REV. at 1155 ("It also provides a 'back-up' system of redress, which responds to the problem of limited agency resources "); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107-08 (2005) ("By deputizing hundreds or thousands of individual citizens and interest groups to act as private attorneys general, citizen-suit provisions (and other forms of express or implied private rights of action) can dramatically increase the social resources devoted to law enforcement, thus complementing government enforcement efforts.").

hour claims can be resolved collectively. Indeed, wage claims are particularly well suited to collective resolution because they often concern a single common employment policy or the common legal question of whether the activity performed was "work." Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 9 (2013).

These common questions, in turn, require common answers for which collective resolution is appropriate, indeed, preferable. *See Wal-Mart Stores, Inc. v. Dukes*, __U.S.__, 131 S. Ct. 2541, 2551 (2011) (noting that a key question for class certification purposes is the capacity to generate common answers). A ruling limiting the ability of employees to recover their unpaid wages through private class or collective actions would undermine the national wage-and-hour enforcement scheme by either burdening state agencies and the USDOL (as well as the courts) with duplicative individual cases that would overwhelm existing public resources or by leaving employees with no means to recover unpaid wages.

This Court has recognized that collective actions provide "plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources" and "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170

(1989). The reality is that for most employees (particularly low-wage employees) a collective or class action is not just preferable to an individual lawsuit, it is their only realistic means of bringing a private wage claim.[35]

There are many reasons why low-wage workers may be unable to bring individual private actions to recover unpaid wages. Such employees are likely to face retaliation. *See* BERNHARDT, ET AL., BROKEN LAWS, UNPROTECTED WORKERS, at 3 (finding that 43% of employees surveyed who complained about workplace violations experienced retaliation by their employers in the form of termination, suspension, threats, or reductions in hours or pay). Low-wage workers often cannot afford to take the necessary unpaid time off of work to locate and then meet with lawyers or attend depositions and hearings. *See* Ruan, 2012 MICH. ST. L. REV. at 1119. In contrast, in a class or collective action, the burdens of prosecuting an action are shared and the

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[35] *See, e.g.*, Finkin, *supra*, 90 IND. L.J. at 855 ("[E]nforcement of wage claims by individual legal action, [are] a chimera for the vast majority of low-wage workers absent effective class actions . . . ."); Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 738 (2010) ("Although a potential outcome of closing the collective action avenue would be more individual lawsuits, such a result would be unlikely to occur The result is fewer lawsuits and more wage violations going unpunished.").

risk of retaliation smaller because of the number of employees involved.

Perhaps the most significant obstacle to bringing a private wage claim, however, is the high cost of litigation, which makes individual legal representation impractical and largely unavailable. A study commissioned by the Washington State Supreme Court's Task Force on Civil Equal Justice Funding, found, for example, that only half of low-wage workers seeking legal help with an employment problem were able to find an attorney to represent them.[36] For most low-wage employees, the amount of wages they are owed, while no doubt significant to them, is not enough to justify the attorney's fees that must be incurred to bring even an individual suit. *See* Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 36 (2014) ("Courts, including the Supreme Court, recognize the importance of aggregate litigation as the only means of relief where a plaintiff's claim is too small economically to support individual litigation and 'private attorney generals' are needed to diffuse the costs and risks among the class."). Thus, for most employees, aggregating their wage

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[36] *See* Task Force on Civil Equal Justice Funding, The Washington State Civil Legal Needs Study, (Olympia, WA: Washington State Supreme Court, 2003), *available at* http://www.wsba.org/atj (follow "Key Documents" hyperlink; then follow "Washington State Civil Legal Needs Study" hyperlink) (last visited September 28, 2015).

claims is the only way to obtain private enforcement of their rights.

II. PETITIONER'S REJECTION OF *MT. CLEMENS* WOULD HAVE PROFOUND NEGATIVE EFFECTS ON BOTH PRIVATE AND PUBLIC ENFORCEMENT OF WAGE-AND-HOUR LAWS AND WOULD PROVIDE INCENTIVES TO EMPLOYERS NOT TO MAINTAIN REQUIRED RECORDS NECESSARY TO ENFORCE MANY LAWS.

When an employer fails to keep statutorily required records and employees' claims raise common legal questions, *Mt. Clemens* holds that representative evidence is permissible to establish the amounts due workers, subject to rebuttal by the employer. 328 U.S. at 687-88. Petitioner's position, however, would make class and collective actions unavailable in cases where such representative evidence is necessary on the grounds that the lack of individualized records defeats predominance. But, as already explained, class and collective actions are critical to effective enforcement of wage-and-hour laws. Thus, by precluding them in cases where employers do not keep accurate records, Petitioner's view would allow employers to rely on one statutory violation—the failure to keep adequate records—to largely insulate themselves from liability on another—the failure to pay statutorily-required wages. Petitioner's approach would undermine the ability of private litigants to recover unpaid wages on behalf of employees, and if accepted by this Court, it could have

implications for direct enforcement actions brought by state agencies on behalf of groups of workers as well as the use of representative proof in a variety of other contexts. Finally, by creating an incentive for employers not to maintain statutorily-required records, it would undermine enforcement of both wage-and-hour regulation and a variety of other laws.

A. The *Mt. Clemens* Framework Is Widely Used and Prevents an Employer from Benefitting from a Failure to Maintain Required Records.

In *Mt. Clemens*, the Court was faced with facts very similar to those presented in this case. There, employees of a large pottery plant sought to recover pay for the time they spent walking to their workplaces and putting on their protective clothing and equipment. 328 U.S. at 682-686. The defendant employer did not track or record the actual amount of time employees spent engaging in these activities. *Id.* at 686.

Mt. Clemens recognized that "it is the employer who has the duty . . to keep proper records of wages, hours and other conditions and practices of employment and who is in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Ibid.* Therefore, when an employer fails to fulfill its statutory duty to keep records "the solution is not to penalize the employees by denying recovery based on an inability to prove the extent of undercompensated work," thereby frustrating the

intent of the statute, "but rather to allow the employee or the Secretary to submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred." *Martin v. Selker Bros., Inc.* 949 F.2d 1286, 1297 (3rd Cir. 1991) (citing *Mt. Clemens,* 328 U.S. at 687). The employer then has the opportunity to rebut this inference, either with evidence of the precise amount of work performed or with "evidence to negative the reasonableness of the inference to be drawn." *Mt. Clemens*, 328 U.S. at 687-88.

The *Mt. Clemens* framework has been used for decades in FLSA cases. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988); *Hodgson v. Elm Hill Meats of Ky., Inc.*, 463 F.2d 1186, 1187 (6th Cir. 1972); *Wirtz v. McClure*, 333 F.2d 45, 47 (10th Cir. 1964); *Foremost Dairies, Inc. v. Ivey,* 204 F.2d 186, 188 (5th Cir. 1953); *Porter v. Poindexter*, 158 F.2d 759, 761-62 (10th Cir. 1947). Under this approach, courts have recognized that the testimony of some employees can establish FLSA claims and damages for non-testifying employees by inference. *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1279 (11th Cir. 2008); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67–68 (2d Cir. 1997); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994); *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.1992); *Martin*, 949 F.2d at 1298; *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *McLaughlin*,

850 F.2d at 589. Similarly, courts have found that use of expert testimony and time studies, sometimes in combination with the testimony of some individual workers, can establish time worked from which wage-and-hour violations may be inferred. *See, e.g., Perez v. Mountaire Farms*, 610 F. Supp. 2d 499, 522-523 (D. Md. 2009), *aff'd in relevant part*, 650 F.3d 350, 362 (4th Cir. 2011); *Metzler v. IBP, Inc.*, 127 F. 3d 959, 965-966 (10th Cir. 1997).

Despite its lengthy pedigree, Petitioner would undermine this doctrine by precluding its use in class and collective actions and indeed, by precluding class or collective action certification altogether in cases in which representative evidence is the only way to establish liability or damages. But as already explained, without aggregating claims, employees may well be unable to recover illegally withheld pay. Moreover, because employers who do not keep the required records would be likely to be able to underpay their employees with impunity, while the employer who does keep records would have to compensate its employees, employers would have an incentive to "violate their statutory record-keeping dut[ies]," *Hart v. RCI Hospitality Holdings, Inc.*, No. 09 CIV. 3043 PAE, 2015 WL 1061501, *12 (S.D.N.Y. Mar. 11, 2015). Such a result is both inequitable and illogical. In such a situation, "the employer, having received the benefits of [the employees'] work, cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Mt. Clemens*, 328 U.S. at 688.

In addition, the *Mt. Clemens* approach has been adopted by many state courts, which generally follow the federal courts' interpretation and application of the FLSA when construing state law. Thus, although state courts can choose not to follow federal precedent in this context, Petitioner's view could disrupt state enforcement as well. Courts in at least 15 States have used the *Mt. Clemens* representative evidence framework. *See, e.g., Barios v. Brooks Range Supply, Inc.*, 26 P.3d 1082, 1086 (Alaska 2001); *Hernandez v. Mendoza*, 245 Cal. Rptr. 36, 39-40 (Cal. Ct. App. 2d Dist. 1988); *Schoonmaker v. Larence Brunoli, Inc.*, 828 A.2d 64, 83 (Conn. 2003); *Johnson & Jenkins Funeral Home, Inc. v. District of Columbia*, 318 A.2d 596, 596 (D.C. 1974); *People ex rel. Illinois Dep't of Labor v. 2000 W. Madison Liquor Corp.*, 917 N.E.2d 551, 556-57 (Ill. App. 2009); *Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 100-01 (Miss. Ct. App. 2014); *Arlington v. Miller's Trucking, Inc.*, 343 P.3d 1222, 1228-29 (Mont. 2015); *New Jersey Dept. of Labor v. Pepsi-Cola*, No. A-918-00T5, 2002 WL 187400, *86-87 (N.J. Super. Ct. App. Div. Jan. 31, 2002) (unreported); *State of New Mexico ex. rel. State Labor Comm'r v. Goodwill Indus.*, 478 P.2d 543, 545 (N.M. 1970); *Mid Hudson Pam Corp. v. Hartnett*, 549 N.Y.S.2d 835, 837 (N.Y. App. Div. 1989); *Cooper v. Creative Homes of Distinction, LLC*, No. COA01-1138, 568 S.E. 2d 337, at *2-3 (N.C. Ct. App. Sept. 3, 2002) (unpublished disposition); *Handford v. Buy Rite Office Prods., Inc.*, 3 N.E.3d 1245, 1250-51 (Ohio Ct. App. 2013); *Braun v. Wal-Mart Stores, Inc.*,

106 A.3d 656, 666-67 (Pa. 2014); *Pugh v. Evergreen Hosp. Med. Ctr.*, 312 P.3d 665, 668 (Wash. Ct. App. 2013). Without *Mt. Clemens*, these cases would be difficult or impossible to bring.

Moreover, state labor enforcement agencies themselves often use representative proof to establish liability and damages on behalf of groups of employees for whom individualized evidence of hours worked is unavailable due to the employer's inadequate records. For example, in *Mid Hudson Pam Corp.*, 549 N.Y.S.2d at 837, the state agency relied on representative proof to establish the extent of a violation of state prevailing wage law involving a large group of employees. Specifically, the wage investigator "formulated a methodology to determine how much compensation was due these workers and how much they were underpaid" because the employer did not keep required records. *Id.* at 836; *see also ibid.* ("The remedial nature of the enforcement of the prevailing wage statute and its public purpose of protecting workmen entitled the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate.") (internal citations omitted); *New Jersey Dept. of Labor*, 2002 WL 187400, *85 (upholding use of representative proof by New Jersey Department of Labor and relying on USDOL's use of such evidence in enforcing FLSA).

Not only could Petitioner's argument disrupt the enforcement of state laws as a practical matter, but

Petitioner's half-hearted suggestion that using the *Mt. Clemens* framework in a class or collective action violates due process, Pet. Br. at 37, if accepted, would directly threaten the viability of these state private and direct enforcement actions. This suggestion of a due process challenge is meritless and indeed, Petitioner cites no authority to support it. The existence of uncertainty and the need to make inferences are standard features of our legal system. As explained *infra*, courts rely on representative evidence and inference to establish liability and damages in all kinds of different cases, particularly where the wrongdoer is responsible for the lack of more precise evidence. Acceptance of Petitioner's argument would thus have implications far beyond wage-and-hour laws.

B. Use of Representative or Inferential Proof Is Not Unique to the Wage-and-Hour Context.

There is nothing particularly remarkable about the use of representative evidence. Just as it allows employees to present evidence from which a "reasonable inference," *Mt. Clemens*, 328 U.S. at 68, can be drawn, so too are such inferences drawn in many areas of law, including areas in which Amici States have significant enforcement responsibility. Moreover, courts in these other areas of law have ensured that a defendant's failure to maintain records itself not preclude recovery. For example, in the antitrust arena this Court has recognized that

> [w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931).

Indeed, courts have long permitted the approximation of aggregate antitrust damages proven as a matter of just and reasonable inference because it "embodies the principle that a too-demanding damages standard would act as an 'inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.'" *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *44

(N.D.Ohio Nov. 17, 2014) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946)).

This understanding can be found in areas of law as disparate as the Employment Retirement Income Security Act (ERISA) and patent law. For example, where an employer was delinquent in making its contributions to a pension fund but did not keep sufficient records to establish what those contributions should have been, courts in ERISA cases have shifted the burden to the employer to dispute the fund's calculations of damages, although those calculations depend on the time worked by each employee. *See, e.g., Brick Masons Pension Trust v. Indus. Fence & Supply*, 839 F.2d 1333, 1338-39 (9th Cir. 1988); *Combs v. King*, 764 F.2d 818, 826-27 (11th Cir. 1985).

Likewise, patent law recognizes the doctrine of "confusion of goods" to ensure that patentees "are not [] penalized by the infringer's failure to keep records necessary to compute damages." 7 DONALD S. CHISUM, CHISUM ON PATENTS, § 20.03[3][c][i], pp. 20-246 to 20-247 (2003). And as in *Mt. Clemens*, the burden of proof as to damages shifts. In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 405-06 (1940), this Court held that "(w)here there is a commingling of gains, [the infringer] must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." *See also Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1572 (Fed. Cir. 1996) ("When the calculation of damages is

impeded by incomplete records of the infringer, adverse inferences are appropriately drawn."); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 891 F. Supp. 751, 818 (E.D.N.Y. 1995) ("the risk of uncertainty in calculating damages is borne by the wrongdoer instead of the injured party"), *aff'd*, 96 F.3d 1409 (Fed. Cir. 1996).

Furthermore, in cases of all kinds, damages can be uncertain and inferences are necessary. *See, e.g., Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 23 (2d Cir. 1996) (using work-life expectancy projections to determine damages in products liability action); *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1538-40 (11th Cir.1985) (using expert projections to prove rental company's lost profits by examining the profits of other comparable business operations); *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500 (5th Cir.1980) (relying on survey evidence of likelihood of confusion, as opposed to evidence of actual confusion, to establish liability in trademark infringement suit). In light of this widespread use of inferential and representative evidence in the face of uncertainty, there is no reason to carve out wage-and-hour law for an insurmountable and inequitable insistence on absolute precision, particularly where the defendant itself is responsible for the impossibility of achieving it.

C. Incentives for Employers Not to Maintain Proper Records Would Undermine Enforcement of Many State and Federal Laws.

Under both federal and state wage-and-hour laws, employers are required to keep accurate records of their employees' work time. *See supra* at 7, 8. Such recordkeeping is essential to the enforcement of those laws, whether by private lawsuits or by state or federal agencies. *Mt. Clemens* provides a strong incentive for employers to comply with these recordkeeping requirements, and weakening it would undermine enforcement efforts.

Moreover, employers' failure to keep accurate records of the hours their employees work would have negative effects on state and federal law enforcement and program administration well beyond wage-and-hour laws. For example, States rely on employers' records of hours worked and wages paid to determine if employees are eligible for unemployment insurance and, if so, to calculate the benefits that they are entitled to receive.[37] An employee's eligibility for workers' compensation and

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[37] *See, e.g.*, Alaska Stat. § 23.20.350 (eligibility for benefits depends on threshold wage earnings during specific time period); Fla. Stat. § 443.111 (same); Mich. Comp. Laws § 421.27 (same). *See also Veverka v. New York State Dept. of Labor*, 404 N.Y.S.2d 276, 277 (N.Y. Sup. Ct. 1978) ("It is by the maintenance and inspection of such records that the public policy of providing unemployment insurance benefits is effective.")

the amount of benefits received similarly hinge on employment records,[38] and eligibility for federal- and state-mandated family-and-medical leave depends on the accurate documenting of hours worked during the year prior to the start of leave.[39] And under ERISA, an employer must keep records of its employees' hours to permit the calculation of benefits. *See* 29 U.S.C. § 1059(a)(1). The more employers fail to keep accurate records of the time their employees work, the more difficult it will be to enforce these laws and administer these programs.

State and federal taxing authorities also rely heavily on employer recordkeeping to determine the amount of income and payroll taxes owed. Yet due in large part to off-the-books work and misclassification of employees as

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[38] Wash. Rev. Code. § 51.08.178 (compensation is based on employee monthly wages and hours worked); 77 Pa. Cons. Stat. § 582 (same); 820 Ill. Comp. Stat. 305/10 (same); N.C. Gen. Stat. § 97-29 (same); La. Rev. Stat. Ann. 23:1600 (same).

[39] *See* 29 C.F.R. § 825.110(c) (federal Family and Medical Leave Act rules provide for burden shifting when employer has not maintained adequate employee records). *See, e.g.*, Conn. Gen. Stat. § 31-51kk (eligibility for benefits under state family and medical leave law depends on hours worked prior to first day of leave); R.I. Gen. Laws Ann. § 28-48-2 (same); Tex. Gov't Code Ann. § 661.912 (family and medical leave for state employees); Miss. Code. Ann. § 25-3-93 (same). *See also Cantrell v. Delta Airlines, Inc.*, 2 F. Supp. 2d 1460, 1462 (N.D. Ga. 1998) ("If an employer does not maintain an accurate record of hours worked by an employee, the employer has the burden of showing that the employee has not worked the requisite hours.").

independent contractors, there is already a growing gap between employment taxes owed and those voluntarily and punctually paid. The federal Internal Revenue Service estimates that the tax gap attributable to underreporting of employment taxes alone is around $54 billion.[40] Similarly, a study commissioned by the USDOL found in 2000 that the Unemployment Insurance Trust Fund loses an average of $198 million annually due to underreporting of employees for Unemployment Insurance tax purposes.[41] These tax gaps can only be expected to increase—and state and federal taxing authorities' ability to successfully audit payroll tax evasion to concurrently decrease—if employers have incentives not to keep accurate records of hours worked and wages paid. *Mt. Clemens* thus supports a larger legal structure, and threats to its continued vitality threaten more than wage-and-hour laws.

* * *

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[40] *See* REPORT OF THE TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED 8 (February 2009); *available at* https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.html (last visited September 28, 2015).

[41] PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS 69 (February 2000), *available at* http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf (last visited September 28, 2015).

Because employer non-compliance with wage laws remains pervasive, the transaction costs of litigation high, and funding to government agencies limited, private class and collective actions brought on behalf of similarly situated employees remain a critically important vehicle for wage-and-hour enforcement nationally. This Court should not adopt new restrictions on class or collective actions that would undermine this longstanding public-private enforcement scheme and that would encourage employers to fail to keep records that are used to enforce numerous other laws.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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No. 14-1146

In the Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*,
individually and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE IMPACT FUND, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, DISABILITY RIGHTS ADVOCATES, THE LEGAL AID SOCIETY, PUBLIC ADVOCATES, AND PUBLIC INTEREST LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

This brief addresses the procedural irregularities that infect the second question presented in Tyson Foods' petition for certiorari: Tyson urged the Court to take this case to decide whether plaintiffs seeking class certification must prove injury to all class members. But Tyson now concedes that point. It disclaims the notion that a class action cannot be "certified in the absence of proof that all class members were injured." Pet. Br. 49. And for good reason: A contrary rule would set Rule 23 against itself, conflict with the substantive law, and pose practical problems for courts and litigants—especially for low-wage workers and civil-rights claimants like those represented by *amici curiae* nonprofit groups.

Abandoning the second question in its petition, Tyson now advocates an entirely new hurdle, which it locates in Rule 23(b)(3)'s predominance requirement—that plaintiffs must prove, at the threshold, "some mechanism" to cull uninjured class members. *Id.* This argument was neither presented nor passed on below. Indeed, Tyson requested the classwide verdict about which it now complains and rejected a contrary procedure.

The Court should therefore follow one of three paths: (1) dismiss the abandoned question, as it recently did in *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772 (2015); (2) dismiss both questions presented, so as not to reward "bait-and-switch tactics," *id.* at 1779; or (3) "stick to the question on which certiorari was sought and granted," *Norfolk So. Ry. v. Sorrell*, 549 U.S. 158, 164 (2007), and affirm the decision below.[1]

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[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission.

STATEMENT

Workers at a Tyson Foods slaughterhouse in Iowa brought this lawsuit, alleging that the company failed to pay them overtime for the time they spent donning and doffing protective gear and walking to and from the processing line, in violation of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), and its state-law analogue. Because Tyson failed to keep time records for those activities—in violation of the FLSA and a federal-court injunction naming the Iowa slaughterhouse at issue here, *see Reich v. IBP, Inc.*, No. 2:88–cv–02171, Dkt. 238 (D. Kan. July 30, 1996)—the workers sought to establish damages using inferential proof. They also sought certification of the case as an FLSA collective action and a class action under Rule 23(b)(3).

1. Class certification. In opposition, Tyson did not argue that certification was improper because some class members did not qualify for overtime. Nor did it contend that the plaintiffs had failed to establish a mechanism to ensure that such class members would not contribute to, or share in, any damages award. Instead, Tyson argued that the issues concerning compensability of donning, doffing, and walking were individualized and would "dominate" the litigation. Dkt. 49, at 3. The court rejected that argument and certified the class. App. 41a–113a.

Tyson later moved to decertify the class, this time contending that it failed Rule 23(a)'s commonality requirement because some members had no compensable injury, so "there is no common answer to liability." Dkt. 212-1, at 7. Tyson primarily argued that the "variation in the time that employees spend donning and doffing" meant that some class members might have been fully compensated by Tyson's "K-Code" time (the amount of time Tyson paid class members for donning and doffing, based on its own study of average times). *Id.* at 7–10.

Tyson also argued that the plaintiffs' evidence showed that a small part of the class (about 6%) had not worked overtime. *Id.* at 9. Tyson never argued, however, that the plaintiffs had failed to establish an adequate mechanism for culling those members or that Rule 23 required one. The court denied Tyson's motion. App. 31a–38a.

2. Trial. Before trial, the plaintiffs proposed a bifurcated proceeding that would address Tyson's concerns about individualized damages. JA 112–13. The first phase would determine common liability issues; the second, damages. But Tyson successfully opposed this proposal, so both issues were tried together. JA 115.

At trial, the plaintiffs presented an expert report by Dr. Liesl Fox, a statistician who calculated the uncompensated time that each class member worked (based on average donning-and-doffing times measured by industrial-engineering expert Dr. Kenneth Mericle). JA 403–08. From those calculations, Dr. Fox determined—for each class member—whether the additional time entitled that member to overtime pay and, if so, how much. *Id.* Dr. Fox concluded that 3,132 members were entitled to damages, while 212 members (whom she identified by name) were not entitled to damages because they did not work overtime. JA 415.

3. Jury instructions and verdict. Tyson asked the court to instruct the jury that "any employee who already has received full compensation for all [activities that you find compensable] is not entitled to recover any damages." JA 101. Tyson also requested that the verdict form provide only an aggregate award—not individualized awards. JA 102–04. The court accepted both proposals. JA 481, 488.

After the jury found in favor of the class and awarded nearly $2.9 million in aggregate compensatory dam-

ages, Tyson again moved to decertify the class, arguing that the plaintiffs failed to prove that "each class member was denied overtime to which they were entitled for performing compensable activities." Dkt. 304-1, at 8. It also argued that the jury awarded damages to "employees to whom Tyson has no liability," *id.* at 13, notwithstanding the jury instructions to the contrary. The court again rejected Tyson's arguments. App. 25a–30a.

4. Appeal. Tyson renewed its arguments on appeal. As before, Tyson did not contend that the plaintiffs had failed (or were required) to propose an adequate culling mechanism. Rather, Tyson argued that "the class should be decertified because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson undercompensated their donning, doffing, and walking." App. 8a.

The Eighth Circuit rejected this argument, holding that "[i]ndividual damage calculations are permissible if they do not 'overwhelm questions common to the class,'" as here. App. 9a (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013)). The court noted that Tyson requested the aggregate award and thus "invited" the very thing about which it complained. App. 10a. Dissenting, Judge Beam reasoned that "[c]ommonality requires the plaintiff to demonstrate . that all class members suffered the same injury." App. 19a. Neither the majority nor the dissent said a word about a culling mechanism.

Tyson successfully sought certiorari in this Court on two questions, the second of which was "[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages." Pet. for Cert. i.

ARGUMENT

I. The Court should dismiss the second question presented as improvidently granted.

A. When Tyson filed its petition for certiorari, it claimed that "the circuit courts are divided" on the question whether "all class members must have standing to sue," such that "plaintiffs must be able to show injury to all class members" when seeking certification. *Id.* at 3, 25. Three circuits, Tyson told this Court, have answered yes, while four "have held that the requirements of Article III are satisfied as long as a single class member was injured and has standing to sue." *Id.* at 3–4; *see also id.* at 26. Tyson asked this Court to "grant review to resolve the circuit split," and represented that it would advocate one side. *Id.* at 30.

But now, "[h]aving persuaded [the Court] to grant certiorari," Tyson "effectively concedes" that neither Article III nor Rule 23 requires proof that all class members have been injured. *Sheehan*, 135 S. Ct. at 1772. Tyson's brief does not cite two of the three decisions on its side of the split, much less defend their holdings. And although it includes a single paragraph (at 48–49) asserting that the third decision (from the D.C. Circuit) was "correctly" decided, the very next sentence disavows that position: "The fact that federal courts lack authority to compensate persons who cannot prove injury," Tyson acknowledges, "does *not* mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Pet. Br. 49 (emphasis added).

Rather than argue the question on which it sought certiorari, Tyson attempts "to rely on a different argument." *Sheehan*, 135 S. Ct. at 1772. It contends that, under Rule 23(b)(3)'s predominance requirement, class

plaintiffs must establish "that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured class members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." Pet. Br. 49–51.

This Court, however, is "typically reluctant to permit parties to smuggle additional questions into a case . . . after the grant of certiorari." *Sorrell*, 549 U.S. at 164. If the Court were to allow Tyson "to switch gears" in this way, it "would be unfair" to the respondents, who did not have the chance to explain why Tyson's new question does not warrant review. *Id.* at 165. It would also disserve the development of the law by rewarding (and thus inviting) such tactics, thereby depriving the Court "of the opportunity to consider, and settle, a controverted question of law that has divided the Circuits." *Sheehan*, 135 S. Ct. at 1779–80 (Scalia, J., concurring in part, dissenting in part). Because Tyson no longer asks this Court to resolve the split on which it sought certiorari, the Court should dismiss the second question as improvidently granted. *See id.* at 1773–74.

B. Dismissal is especially appropriate here because Tyson's new argument was neither pressed nor passed upon below. Until its merits brief in this Court, Tyson never contended that Rule 23(b)(3)'s predominance requirement (or anything else, for that matter) demands that class plaintiffs produce, at the threshold of a case, a "mechanism for culling uninjured class members." Pet. Br. 49. If anything, Tyson did the opposite: Whereas it now claims (at 51) that "the individual questions of which class members were injured" preclude a finding of predominance, Tyson argued below that *other* questions would "dominate" this litigation. Dkt. 49, at 3. And Tyson never made *any* predominance argument to the court of

appeals—let alone one focusing on a culling mechanism—and hence that court never considered the question. Tyson Br., *Bouaphakeo v. Tyson Foods*, No. 12-3753 (8th Cir. filed Feb. 8, 2013), at 38–41; App. 8a–10a.

This Court "does not ordinarily decide questions that were not passed on below." *Sheehan*, 135 S. Ct. at 1773; *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (dismissing writ). Under the Court's "traditional rule," when a question "was not pressed or passed upon below," it "precludes a grant of certiorari." *United States v. Williams*, 504 U.S. 36, 41 (1992). This rule "promote[s] respect" for the Court's "adjudicatory process" and ensures that the Court will not be "tempted to engage in ill-considered decisions of questions not presented in the petition" and not considered below. *Adarand Constructors*, 534 U.S. at 110–11. "[O]nly in exceptional cases" will this Court consider a question not preserved below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

This is not such a case. Tyson has pointed to "no special circumstances explaining its failure to preserve this question." *City of Springfield v. Kibbe*, 480 U.S. 257, 258–59 (1987) (per curiam). To the contrary, the Court's traditional rule "has special force" here because Tyson "itself requested" the classwide verdict about which it now complains, and successfully opposed a bifurcated proceeding that would have generated individualized awards (and thus ensured that no uninjured class member received compensation). *Id.* at 259; *see* JA 11–15, 102–04. In light of the "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested," this Court has dismissed a writ as improvidently granted even when the issue it presented "was passed on by the

Court of Appeals below." *Kibbe*, 480 U.S. at 259. This case is an even stronger candidate for dismissal.[2]

C. Nor would Tyson's new question have been worthy of this Court's review had it been included in the petition and preserved below. The question is splitless, and this case is an especially poor vehicle for exploring it. The jury instructions (which Tyson proposed, *see* JA 101, 481) make clear that class members without compensable injuries did not "contribute to the size of [the] damage award" and "cannot recover . . . damages under it." Pet. Br. 49. To the extent that Tyson is now objecting to how the award will be allocated, that has not happened yet, and Tyson lacks standing to make the argument anyway. *See* Resp. Br. 58. To the extent that Tyson is complaining that the plaintiffs failed to submit evidence showing that it is possible to identify class members who lack damages, that is simply wrong. The plaintiffs' expert, Dr. Fox, produced a report calculating the uncompensated time that each individual class member worked based on the estimated time that workers spent donning and doffing, and then determined whether each member was entitled to overtime pay. JA 403–08.

No court to our knowledge has ever held that Rule 23 requires more. That is hardly surprising. If the rule forced plaintiffs, at the certification stage, to account for every possible jury verdict for any class with at least one uninjured person then Rule 23 would, in practical effect, preclude certification of such a class—the very argument Tyson has now rightly abandoned.

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[2] The dissenters in *Kibbe* would have reached the issue only because "the Court of Appeals expressly ruled on the question." 480 U.S. at 266 (O'Connor, J., dissenting). Not so here.

That, at least, would be the result for employers like Tyson, who violate statutory recordkeeping obligations. For let us not forget what the usual "culling mechanism" is in a wage-and-hour class action: the employee time records that federal law mandates employers to keep, and that Tyson did not keep (notwithstanding a federal-court order requiring those records at this particular Iowa slaughterhouse). Rule 23 should not be interpreted to *allow* class actions against employers who dutifully comply with recordkeeping requirements, but *prohibit* class actions against employers like Tyson, who repeatedly flout those requirements. For this reason, too, the Court should dismiss the second question presented as improvidently granted.

II. Rather than reward Tyson's bait-and-switch tactics, the Court may dismiss both questions presented as improvidently granted.

The Court may also wish to follow the path urged by Justice Scalia in *Sheehan* and dismiss *both* questions presented. 135 S. Ct. 1779–80 (Scalia, J., concurring in part and dissenting in part). To do otherwise would "reward" Tyson's "bait-and-switch tactics" and "encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge" that the Court will consider whatever arguments "they choose to present in their merits brief." *Id.* at 1779.

It is true that the majority in *Sheehan* declined to dismiss both questions presented by San Francisco's petition. But it did so for two reasons: (1) because San Francisco's unabandoned question concerned "the liability of individual officers," who had their own "personal interest in the correctness of the judgment," and (2) because the Court, given the importance of qualified immunity to "society as a whole," frequently engages in

error-correction in cases subjecting individual officers to liability. *Id.* at 1774 n.3. Neither reason applies here.

Tyson's first question presented is whether a class may be certified "where liability and damages will be determined by statistical techniques that presume all class members are identical to the average observed in a sample." Pet. for Cert. i. That question concerns only Tyson's liability, not the individual liability of those tasked with protecting and serving the public. And Tyson itself proposed a jury instruction (adopted by the district court) explaining that the jury could award damages to non-testifying class members based on "representative evidence," even though "those damages will only be approximate." JA472, 481.

More importantly, the first question presented (like the second) has evolved since the Court granted certiorari. At that point, the question concerned the meaning of the prohibition on a "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)—a question that Tyson claimed has divided the circuits. Pet. for Cert. 2–3. But now the question is less about *Wal-Mart* and more about the applicability of this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which provides the substantive rule of law for wage-and-hour cases like this one, where the employer fails to comply with statutory recordkeeping requirements. In such cases, employees may use reasonable inferential evidence to prove damages.

Whether the inferential evidence submitted by the plaintiffs at trial satisfies *Mt. Clemens*' evidentiary standard is a fact-bound question that does not implicate a circuit split and whose resolution does not benefit society as a whole. And Tyson has not asked this Court to overrule *Mt. Clemens*. Had this been the only issue presented in Tyson's petition for certiorari, "there was

little chance that [the Court] would have taken this case to decide only [this] fact-bound QP." *Sheehan*, 135 S. Ct. at 1779 (Scalia, J., concurring in part and dissenting in part). Under these circumstances, "there is no injustice" in dismissing both questions as improvidently granted. *Id.* at 1780. Quite the opposite, "the fair course—the just course—is to treat this now-nakedly uncertworthy question the way [the Court] treat[s] all others: by declining to decide it." *Id.* Indeed, there is an even stronger reason for the Court to follow that approach here given Tyson's turnabout on the second question: "to avoid being snookered, and to deter future snookering." *Id.*

III. Alternatively, because Tyson has conceded the answer to the petition's second question, this Court should stick to that question and affirm.

Should this Court decline to dismiss the second question as improvidently granted, then it "should stick to the question on which certiorari was sought and granted." *Sorrell*, 549 U.S. at 165. That question asks whether a class "may be certified or maintained" when it includes "members who were not injured and have no legal right to any damages." Pet. for Cert. i. As Tyson concedes, the answer is yes. Precluding certification of such classes—as the Chamber of Commerce advocates (at 6–11)—would pit Rule 23 against itself, conflict with the relevant substantive law, and create perverse incentives for defendants to keep poor records at the expense of civil-rights claimants and low-wage workers.[3]

A. Start with Rule 23. Nothing in the rule's text, structure, or purpose requires the plaintiff to prove that

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[3] Although the Chamber grounds its theory in Article III, that is wrong for the reasons laid out in the respondents' brief (at 51–54).

all class members suffered a compensable injury. Rule 23(a) requires that a class contain at least one question of law or fact "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. But this does not mean that the common question must concern damages.

Nor does Rule 23(b)(3) contain such a requirement. To the contrary, the rule's text "itself contemplates" that "individual questions will be present." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012). The rule requires that common questions *predominate* over individuals issues, not that there be *no* individual issues. As this Court has stressed, the rule "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to common proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (brackets and internal quotation marks omitted). That includes damages. If all other elements in a case are susceptible to common proof, as they are here, then those issues can predominate over the individualized question of damages. The "focus of the predominance inquiry" is on whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Id.* at 1196–97 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

This class satisfies that standard. Just as the "black letter rule" is "that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members"—a rule Tyson does not challenge—the same is true when some class members might later turn

out to have no damages. *Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting); *see also Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).[4]

Were the rule otherwise, class plaintiffs would be required either to prove the merits of their claims at the outset or else to define the class by reference to the merits (to include, for example, only those members who suffered a compensable injury as a result of the defendant's unlawful conduct). "But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009). That result is impermissible under Rule 23, which "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194–95.

Moreover, a damages class must be capable of definition *before* a decision on the merits, because the dis-

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[4] Tyson suggested below that, even if Rule 23 permits certification of classes with individualized damages, it does not permit certification when at least one member has no damages, because that member should lose on the merits (rather than receive no compensation, but technically be part of the class). *See, e.g.*, Tyson Br., *Bouaphakeo v. Tyson Foods*, No. 12–3753 (8th Cir. filed Feb. 8, 2013), at 33. Although Tyson continues to press this argument as to the *Mt. Clemens* question, it no longer does so as to the second question. Tyson's distinction, in any event, is purely academic. It is not required by Rule 23, Article III, or due process, nor would it serve their purposes. If 3,000 people have individualized damages amounts, why should they be permitted to form a class action only if each amount is guaranteed to be at least $0.01? Nothing in the concept of predominance compels that rule, and it is not needed to "ensure that uninjured class members do not contribute to the defendant's liability or share in any class recovery," but serves only to waste resources. Pet. Br. 44 (capitalization removed).

trict court must notify the class of the suit. *See* Fed. R. Civ. P 23(c)(2)(B). But if a class were defined by reference to the merits, "so that whether a person qualifies as a member depends on whether the person has a valid claim," who would receive notice? *Messner*, 669 F.3d at 825. And how would such a definition be fair to defendants, if "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment"? *Id.* For these reasons, courts have generally refused to certify such "fail-safe" classes that "cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *see* 7A Wright & Miller, *Federal Practice and Procedure* § 1760 (3d ed.) (explaining that courts "have ruled that requiring fail-safe classes for certification is improper").

As a result, if Rule 23 required plaintiffs to ensure, at the threshold, that the class contains no uninjured class members, it would put plaintiffs in a Catch-22, forcing them to propose a class that either fails predominance or is insufficiently defined. "Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem" is hard enough as it is. *Messner*, 669 F.3d at 825. But it would be "almost impossible in many cases" if plaintiffs were forced to "exclud[e] all uninjured class members at the certification stage." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015). In many cases, "it is simply not possible"—at least not "[w]ithout the benefit of further proceedings"—"to entirely separate the injured from the uninjured at the class certification stage." *Id.*; *see also Kohen*, 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they

are known still the facts bearing on their claims may be unknown."). The upshot, then, would not be a more narrowly drawn class, but no class at all—a result squarely at odds with Rule 23's purposes.

This case illustrates the point. If Rule 23 forced the respondents to eliminate any possibility that a class member would not have suffered a compensable injury, they would likely have sought to define the class to include all employees who worked more than 40 hours at the Iowa slaughterhouse in at least one week during the class period. But whether an employee worked more than 40 hours in a week may very well depend on whether donning and doffing counts as compensable time (and, if so, how much). That is, class membership may turn on the jury's determination of the merits.

That would be especially true if Tyson's primary argument below were accepted. In the district court, and again on appeal, Tyson took the position that "variation in the time that employees spend donning and doffing" could make some class members uninjured because they might have been fully compensated by the "K-Code" time. Dkt. 212-1, at 7–10. This argument, of course, merges with Tyson's *Mt. Clemens* argument. But it also raises an insurmountable fail-safe problem: The only way to bring this case as a class action would be to define the class to include anyone who spent more than the allotted K-Code time donning and doffing—a question that cannot be answered at the threshold. The net result would be to dismantle the class device in one of the scenarios in which it is most needed—small-dollar wage-and-hour class actions, where the defendant has refused to keep time records—to the detriment of low-wage workers.

B. Requiring plaintiffs to prove, at the certification stage, that all class members suffered a compensable

injury would also conflict with the relevant substantive law in a range of cases, which already presumes that some class members might not be able to prove their claims on the merits.

In securities cases, for instance, investors can recover damages only if they can "prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock." *Halliburton Co. v. Eric P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014). Last year, this Court reaffirmed the rule, first announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that "investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements." *Halliburton*, 134 S. Ct. at 2405.[5] But defendants may rebut this presumption with individualized evidence "showing that [a class member] did not rely on the integrity of the market price in trading stock." *Id.* at 2412.

The possibility that some class members will not be entitled to damages, however, does not defeat certification. As this Court explained in *Halliburton*, even though there may be "individualized questions of reliance in the case," certification is permissible because "there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Id.* (internal quotation marks omitted). "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual

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[5] This is a "substantive doctrine of federal-securities law that can be invoked by any . . . plaintiff," though it "has particular significance in securities-fraud class actions." *Amgen*, 133 S. Ct. at 1193.

questions to predominate." *Id.* *Halliburton* thus "contemplated that a class with uninjured members could be certified if the presence of a de minimis number of uninjured members did not overwhelm the common issues for the class." *In re Nexium*, 777 F.3d at 24. This Court's decision in *Amgen* did so as well. It affirmed certification of a securities class action despite "individual questions of reliance" that could defeat some class members' claims, 133 S. Ct. at 1197 (internal quotation marks omitted)—explicitly rejecting the dissent's argument that the plaintiffs had "fail[ed] to demonstrate that common questions predominate over the individualized questions of reliance that are inherent in a securities fraud claim," *id.* at 1211 n.8 (Thomas, J, dissenting).

Title VII provides another example. As interpreted by this Court, the statute permits the use of pattern-or-practice evidence to prove that an employer had a discriminatory policy. *See Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324 (1977). This Court has made clear that the government may bring an enforcement action relying on such evidence to establish liability, without having to prove that "each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360. And the Court has allowed plaintiffs to do the same in the class context, permitting certification even though some class members "may not in fact have been actual victims of racial discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771–73 (1976). Any individualized questions of injury and entitlement to relief, the Court explained, are better addressed at the remedial stage—not class certification. *Id.*

C. Finally, precluding certification of any class or collective action with uninjured members would have the perverse incentive of encouraging poor recordkeeping by

employers and other potential defendants. After all, had Tyson complied with its statutory requirements (and a federal-court injunction) and kept time records, there would have been no need to resort to inferential proof under *Mt. Clemens*. The task of determining who is in the class, and whether they were injured, would have been made exponentially easier. But Tyson did not do so.

Tyson's willful noncompliance of federal law should not count as a point in its favor under Rule 23. If it did, unscrupulous employers of migrant farmworkers, to take just one example, could fend off accountability through a class or collective action by relying on their own failure to keep employment records. That result is inconsistent with the purposes of both Rule 23 and the FLSA (not to mention parallel state laws).

Long ago, in *Mt. Clemens*, this Court emphasized that workers seeking to band together to vindicate their rights should not be "penalize[d]" by their "employer's failure to keep proper records in conformity" with the law. 328 U.S. at 687. Just as the *Mt. Clemens* Court refused to interpret the FLSA "to allow [such] employer[s] to keep the benefits of an employee's labors without paying due compensation," this Court should refuse to allow those employers to achieve the same result by thwarting class or collective actions. *Id.* Rule 23, no less than the FLSA, should be read to encourage enforcement of the law—not its violation.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX: IDENTITIES OF *AMICI CURIAE*

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in a number of major civil-rights class actions, including cases challenging wage-and-hour violations, employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

California Rural Legal Assistance Foundation (CRLAF) is a nonprofit California organization established to provide legal services to low-income individuals and families in rural California. CRLAF advocates have extensive experience and nationally recognized expertise in the interpretation of California wage-and-hour laws. CRLAF represents low-income families in rural California and engages in regulatory and legislative advocacy that promotes the interests of low-wage workers, particularly farm workers.

Disability Rights Advocates (DRA) is a nonprofit public-interest legal center that specializes in high-impact civil-rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology, and housing. DRA's clients, staff, and board of directors include people with various types of disabilities. With offices in Berkeley, California, and New York City, DRA strives to protect the civil rights of people with all types of disabilities.

The Legal Aid Society – Employment Law Center (LAS-ELC), founded in 1916, provides free legal services to low-income individuals who cannot afford private

counsel. Since the 1970s, the LAS-ELC has addressed its clients' employment through a combination of impact litigation, direct services, and administrative and legislative advocacy. The LAS-ELC offers direct assistance to thousands of low-wage workers with wage-and-hour legal problems, among other issues, and has prosecuted numerous wage-and-hour, employment-discrimination, and disability-rights class actions in the state and federal courts.

Public Advocates, Inc. is a nonprofit, public-interest law firm and one of the oldest public-interest law firms in the nation. Public Advocates uses diverse litigation and non-litigation strategies to handle exclusively policy and impact cases to challenge the persistent, underlying causes and effects of poverty and discrimination. Its work currently focuses on achieving equality in education, housing, and transportation. Throughout its history, Public Advocates has consistently employed the class-action mechanism to obtain relief on behalf of large numbers of individuals. As such, the organization has a strong interest in the continued effective functioning of the class action mechanism.

The Public Interest Law Project is a nonprofit state-litigation and advocacy-support center for California legal services and public-interest law programs. Its mission is to provide these local programs with the capacity to engage in law-reform efforts that will preserve and increase the rights and economic wellbeing of indigent and lower-income families in California. One of the services it provides to local programs is the ability to bring class-action litigation when such a strategy presents the best option for advancing or protecting the interests of the program's clients.

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PROFESSORS ALEXANDRA D. LAHAV & SACHIN S. PANDYA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The *amici* are law professors who teach and write about federal civil procedure or employment law, including Rule 23 class actions and the Fair Labor Standards Act, respectively. Alexandra D. Lahav is the Joel Barlow Professor of Law at the University of Connecticut. Sachin S. Pandya is Professor of Law at the University of Connecticut. We submit this brief to help this Court answer the second question presented in this case.

SUMMARY OF ARGUMENT

On the second question presented, Article III does not require the class representative in a Rule 23 class action to prove at the class certification stage that every class member will prevail on the merits of their legal claims. To argue otherwise, Tyson implicitly redefines the Article III "injury" here as a failure to receive wages *owed*, so that the presence of an Article III "injury" depends on claim merit. Article III jurisdiction, however, does not depend on whether the asserted legal claims have merit.

In class actions, because Rule 23 requires that the class representative's claims be typical of the absent class members' claims, so long as the class representative himself has Article III standing, the

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' letters of consent to the filing of this brief are on file with the Clerk.

federal court has enough to be assured, at the time of class certification, that the absent class members also have a genuine case or controversy. Tyson's reading of Article III, by contrast, would transform class actions into a form of permissive joinder, despite Rule 23's own requirement that the class must be so numerous that joinder is impracticable. Such a view would undo the efficiency, fairness, and preclusive effect of Rule 23 class actions. Article III does not require these results.

Tyson also conflates Rule 23 class actions with Fair Labor Standards Act (FLSA) collective actions. Deciding whether an opt-in plaintiff can join a FLSA collective action resembles a less-stringent form of Rule 20(a) permissive joinder; there is no predominance requirement. Even if an opt-in FLSA plaintiff is ultimately unable to prove that the defendant owes her damages, she may still be "similarly situated" to an original plaintiff in that action.

ARGUMENT

I. Article III Does Not Require a Plaintiff to Prove the Merits of Every Rule 23 Class Member's Claim at the Class Certification Stage.

Tyson and its amici argue that to represent a Rule 23(b)(3) class, the named plaintiffs must prove, at the class certification stage, not only their own Article III standing, but also the Article III standing of every absent class member, as if each absent class member had filed his or her own separate lawsuit. Pet. Br. 21. In the alternative, Tyson argues that, before

class certification, the named plaintiffs must at least provide a "mechanism" to identify and exclude "the uninjured class members" before final judgment. *Id.* To argue that "constitutional and statutory standing" so require, *id.*, Tyson conflates Article III with claim merit by implicitly defining a class member's Article III "injury-in-fact" to *depend* on the merit of his claim that he was owed wages under the Iowa Wage Payment Collection Law (IWPCL).

In general, Article III jurisdiction does not depend on proving claim merit. For class actions, Rule 23 itself does not require independently proving each class member's Article III standing or claim merit as a condition of class certification. Article III standing doctrine does not require reading Rule 23 otherwise.

A. Article III judicial power over a lawsuit does not turn on claim merit.

Article III "judicial Power" over "Cases" or "Controversies," U.S. Const. art. III, § 2, does not depend on claim merit, because whether a lawsuit presents "a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *accord Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1391 n. 6 (2014).

Indeed, individual private lawsuits claiming a defendant's failure to pay money owed have always been understood to be "Cases" or "Controversies," U.S. Const. art. III, § 2, "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co.*, 523

U.S. at 102, regardless of whether the plaintiff ultimately prevails. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242-44 (1937) (insurer's declaratory judgment action based on insured's failure to pay premiums owed under disability insurance policy); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (inventor suit against patent licensee for failure to pay royalties owed under patent licensing agreement).

If Article III judicial power over such lawsuits *did* depend on whether the plaintiff prevailed on the merits, then in the many federal lawsuits in which a plaintiff claimed but could not prove that a defendant illegally failed to pay him money owed for goods or services rendered, the federal court would have had to dismiss for lack of subject-matter jurisdiction, see *Steel Co.*, 523 U.S. at 94-95, and such dismissals may have no res judicata effect under existing law, see *Hughes v. United States*, 71 U.S. 232, 237 (1866); 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4436 (2d ed. 2002).[2] In fact, however, in such garden-variety private lawsuits, federal judges ordinarily enter an adverse judgment.

Here, Tyson tries to circumvent the rule that Article III jurisdiction does not depend on claim merit by defining the Article III "injury-in-fact" — the actual and concrete "invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) — to depend on claim merit. To see how,

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[2] Issue preclusion may prevent plaintiffs from re-litigating Article III jurisdiction in a subsequent proceeding. *See* 18A Wright et al., *Federal Practice & Procedure* § 4436 (2d ed. 2002 & Supp. 2015).

consider an ordinary individual private lawsuit, filed in federal court, in which a plaintiff claims that a defendant illegally failed to pay him or her some amount of money owed—for example, wages for services rendered or payment for goods exchanged. If the defendant in fact failed to pay plaintiff that money, the suit plainly qualifies as an Article III case or controversy. If the plaintiff ultimately cannot show that the defendant owed him by law the amount that he failed to pay, the defendant might *colloquially* say that he had not "injured" the plaintiff at all. To say this, however, one has to redefine the "injury" from not receiving money to not receiving money *owed* by law, which is to redefine the "injury" to depend on the merits of the legal claim.[3]

Here, Tyson implicitly redefines the Article III "injury-in-fact" as not receiving wages *owed* under the IWPCL. This Court need not and should not erode the distinction between Article III jurisdiction and claim merits by requiring that plaintiffs who claim they were owed wages prove the merits of their claim as a condition of Article III standing. That would "confuse[ ] weakness on the merits with absence of Article III standing." *Davis v. United States*, 131 S. Ct. 2419, 2434, n. 10 (2011); *accord Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015); *see Warth v. Seldin*, 422 U.S. 490, 500

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[3] This is easy to see in a case of simple battery. Punch someone in the face, and the "injury" ("his bloody nose") can be defined separately from claim merit—the elements of battery—or defined to depend on claim merit (e.g., "his bloody nose if you punched him under circumstances that satisfy the elements of battery").

(1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

B. Article III does not require Rule 23 class certification to turn on the merits of the absent class members' claims.

Article III also does not require Rule 23 class certification to depend on the merits of class members' claims. Tyson's argument to the contrary ignores the purpose of Article III standing doctrine and the structure of Rule 23. Article III standing doctrine—including the requisite "injury-in-fact"—assures that parties have an actual, not "professed, stake in the outcome," and that judges will resolve the legal issues presented "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Massachusetts v E.P.A.*, 549 U.S. 497, 517 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment)).

Rule 23 provides a mechanism for achieving these goals. The Rule 23 class representative must himself have Article III standing, *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and must have claims that are "typical of the claims . . . of the class" as defined, Fed. R. Civ. P. 23(a)(3). If these requirements are met, a court has enough information to be assured at the class certification stage that the absent class members also have a similarly genuine controversy. *See Neale v. Volvo Cars of N. Am.*, 794 F.3d 353, 368 (3d Cir. 2015) ("a properly formulated Rule 23 class should not

raise standing issues," because Rule 23 "test[s]" whether class representative shares the interests or injuries of the class members).

If plaintiffs had to independently identify and prove each and every absent class member's Article III standing at the class certification stage, Rule 23 class certification would differ from Rule 20 permissive joinder in name only, even though class certification requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P 23(a)(1). In effect, the burden at the class certification stage would become the necessarily impractical burden of joining each class member. Imposing that impractical burden goes well beyond what is needed to assure that Rule 23 class-actions involve parties with real stakes in the outcome and to "confine[ ] the Judicial Branch to its proper, limited role," *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and in the judgment).

More importantly, Article III certainly does not require reading Rule 23 to *also* demand merits adjudication of absent class members' claims at the class certification stage. To be sure, a party seeking class certification must show that it in fact satisfies Rule 23, and sometimes that requires deciding questions that are also relevant to the merits of the putative class's legal claims. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). Rule 23, however, does not authorize "free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen, Inc. v. Connecticut*

Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1195 (2013) (emphasis added). Article III's requirements are consistent with this procedure. No less than if a putative class member had filed suit individually, a court's Article III "*power* to adjudicate the case" does not turn on whether he or she has "a valid . cause of action." *Steel Co.*, 523 U.S. at 89.

The burden of proving the merit of each putative absent class member's claim at class certification is also impractical, because a judge must decide whether to certify a Rule 23 class at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(A). That time usually occurs before traditional discovery and the crucible of trial produces a well-developed factual record. It is often impossible at that time to personally identify and determine the merits of each and every absent class member's claim.

Accordingly, such a burden of proof at the class certification stage would undo the efficiency and fairness gains of Rule 23(b)(3) class actions; "in effect the trial would precede the certification," *Kohen v. Pacific Investment Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009), the exact reverse of the order required by the Federal Rules. To the contrary, Rule 23's operation depends on "judicial willingness to certify classes that have weak claims as well as strong ones." *Szabo v. Bridgeport Machines*, 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J).

Tyson's reading of Article III and Rule 23 would cause plaintiffs to be less likely to seek class certification for putative class members with meritorious claims, given the additional expense and

effort. Or, if plaintiffs pursue class certification all the same, district courts will expand the scope of so-called certification discovery to rival traditional discovery and the class-certification hearing will become, in substance if not in form, a bench trial on the merits. If so, plaintiffs seeking Rule 23 class certification would bear much of the costs but forego the procedural-fairness safeguards of a real bench or jury trial. Article III does not require these results.

Tyson's view of Article III and Rule 23 would also erode a key benefit of class actions: finality or global peace. In general, if a class is not certified, any putative absent class member may litigate his or her claim in a later lawsuit. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-80 (2011). Tyson's view implies that if some class members were later found not to be entitled to relief on the merits, or if plaintiffs lost on the merits, they would thereby lack Article III "injury-in-fact" (as Tyson has defined it). If so, the district court would be obliged to de-certify the class and dismiss the whole suit for lack of subject-matter jurisdiction, opening to the door to more suits. Only if a court found that all the class members were entitled to relief would the class action have preclusive effect.

What if some class members are not entitled to damages? That is not an Article III issue but one of trial management. *See generally* 3 William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 10:5 (5th ed. 2011 & Supp. 2015) (discussing trial plans). If a district court has certified a Rule 23 class, and *thereafter*, thanks to traditional discovery and trial practice, the parties discover evidence that warrants narrowing or refining the class, the district

court can "alter [ ] or amend[ ]" its certification order before final judgment. Fed. R. Civ. P. 23(c)(1)(C). *Cf. Kohen*, 571 F.3d at 679 (suggesting that defendant sample a random selection of class members to prove its claim that large numbers of them did not suffer from alleged violations of securities laws). If a defendant can show before final judgment that it actually does not owe any money to a subset of class members, then it may be more efficient for the court to craft a judgment order that specifies which class members have claims with merit, because that judgment then binds all class members.

C. The Rule 23 class here was properly certified even if some class members are later found not to be owed wages.

Once we set aside Tyson's Article III makeweight, the Rule 23 analysis here is unexceptional. The class members share this common question: whether "the donning and doffing and/or sanitizing of the [personal protective equipment] at issue constitutes 'work' for which plaintiffs are entitled to compensation," given Tyson's "company-wide compensation policy that is applied uniformly throughout [its] entire Storm Lake facility." Pet. App. 37a (District Court Order Denying Mot. For Decertification of Rule 23 Class at 6). The jury found that these activities are compensable work and this finding applies to all the class members regardless of the number of hours worked. This answer "resolve[d] an issue that is central to the validity of each one of the[ir] claims in one stroke." *Dukes*, 131 S. Ct. at 2545. Had Tyson prevailed on this common question, the case would have been over.

Further, this "common" issue "predominate[s]" under Rule 23(b)(3). If Tyson had properly made and kept records of the hours each employee spent donning and doffing and/or sanitizing protective equipment, as FLSA requires, 29 U.S.C. § 211(c), a court could have more easily resolved the individual issue—whether the class member worked enough compensable hours to be owed some back wages for overtime. The "common" issue, however, *still* predominates, because other types of evidence, and permissible inferences from that evidence, can substitute for the lack of record keeping. It is still less efficient to hear 3,000 individual cases for back pay than to answer the common question to all of those employees in a single case. That is why a class action is a "superior method to other available methods" of resolving such a dispute. Fed. R. Civ. P. 23(b)(3). Accordingly, this is an unexceptional case for class certification, which is analytically distinct from whether the district court here properly admitted certain kinds of evidence in the trial itself.[4]

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[4] For example, if Tyson had intentionally destroyed otherwise admissible records of hours worked, the parties may disagree whether a spoliation inference is proper, but that issue would not matter to whether the common question here predominates under Rule 23(b)(3).

II. A FLSA Collective Action's Opt-In Plaintiffs Can Be "Similarly Situated" Even if Some of Them Are Later Found Not To Be Owed Wages.

In appealing the district court's refusal to "decertify" the FLSA collective action, Tyson conflates FLSA collective actions and Rule 23(b)(3) class actions. Pet. Br. 26. This Court should not import into FLSA its interpretation of Rule 23(b)(3) (predominance), because a FLSA collective action "fundamentally differ[s]" from a Rule 23 class action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2012).

FLSA provides that one or more employees may sue any employer for themselves and "in behalf of other employees similarly situated." 29 U.S.C. § 216(b).[5] A "similarly situated" employee can "be a party plaintiff" in (opt into) such a FLSA action by filing a written consent with the court, *id.*, which has the "requisite procedural authority to manage the process of joining multiple parties" into the action, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

FLSA section 216(b), as amended, precedes the present-day Rule 23 by many decades and is "not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23, Advisory Committee's Note, reprinted in

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[5] *See also* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b) by reference into Age Discrimination in Employment Act); 29 U.S.C. § 206(d) (Equal Pay Act, which is enforceable by section 216(b) collective action).

39 F.R.D. 69, 104 (1966). Instead, FLSA section 216(b)'s opt-in provision provides for a kind of permissive joinder of plaintiffs, see *Hoffman-La Roche*, 493 U.S. at 171 (describing court's "managerial responsibility" under section 216(b) as "oversee[ing] the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"); *id.* at 181 (Scalia, J., dissenting) (analogizing § 216(b) to Rule 20(a)(1) permissive joinder of plaintiffs), that is "less stringent" in its prerequisites than those for joinder of plaintiffs under Federal Rule of Civil Procedure 20(a)(1), see *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

Tyson's key mistake is to assume that opt-in plaintiffs are "similarly situated" to an original party plaintiff under section 216(b) only if those plaintiffs share questions of fact or law that are *dispositive* of the merits of each plaintiff's own FLSA claim. This is error, as it makes joinder under section 216(b) *more* stringent than permissive joinder under Rule 20(a). Rule 20(a) joinder of plaintiffs requires, among other things, just one common question of law or fact—literally "any" one will do, Fed. R. Civ. P 20(a)(1)(B), even if answering that common question does not resolve all the plaintiffs' claims on the merits. Similarly, ruling a potential opt-in employee to be "similarly situated" under section 216(b) does *not* require ruling that such employee has proven liability. *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 262 (S.D.N.Y. 1997) (Sotomayor, J.). Thus, opt-in plaintiffs may be "similarly situated" yet not prevail on their claims.

This is why, in cases where some opt-in plaintiffs are later found not to be "similarly situated," a district court must not dismiss the entire collective action. *Cf.* Fed. R. Civ. P. 21 (misjoinder is not a ground for dismissal of the action). Rather, as with any erroneous joinder, the district court can sever the non-"similarly situated" plaintiffs' FLSA claims. Each severed claim would then receive its own docket number and proceed as if it had been filed separately. *Lee v. Cook County*, 635 F.3d 969, 971 (7th Cir. 2011). Or the court could sever the claims of "subgroups" of similarly situated plaintiffs to proceed separately as multiple FLSA collective actions. *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. 1998) (Sotomayor, J.).

Tyson also errs by applying Rule 23(b)(3)'s predominance requirement to FLSA collective actions. Just as a common question for Rule 20 joinder need not predominate, see *Lee*, 635 F.3d at 971, most lower courts do not read Rule 23(b)(3)'s predominance requirement into FLSA section 216(b). Instead, they decide, provisionally at first and then finally, whether those who want to opt into the action, and have filed the requisite written consent, are "similarly situated" employees. *See, e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537, 554-555 (2d Cir. 2010); *Zavala v. Wal Mart Stores*, 691 F.3d 527, 536-38 (3d Cir. 2012); *O'Brien v. Ed Donnelly Enterprises*, 575 F.3d 567, 584-86 (6th Cir. 2009); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1260-62 (11th Cir. 2008). Although some courts use the phrase "conditional certification" when they provisionally decide this issue, this "is not tantamount to class

certification under Rule 23." *Symczyk*, 133 S. Ct. at 1529.[6]

Here, the plaintiffs were "similarly situated" with respect to "whether donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs are 'work' within the meaning of the FLSA." J.A. 475 (Jury Instruction No. 5). FLSA does not require this issue to "predominate" over all the other issues in each opt-in plaintiff's FLSA claim, let alone be dispositive of their claims, for a FLSA collective action to proceed.

Finally, just as the issue of whether plaintiffs were properly joined under Rule 20(a) precedes the question of how a court should address the individual issues in the joined cases, whether opt-in plaintiffs are indeed "similarly situated" employees precedes, and should not be confused with, the question of how the court should thereafter resolve, for those "similarly situated" opt-in plaintiffs, the individual issues that remain, if any, for their FLSA claims, see, e.g., *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 623 (S.D. Iowa 1946) (ordering separate trials on remaining individual issues).

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[6] *But see Espenscheid v. DirectSat USA*, 705 F.3d 770 (7th Cir. 2013). The court there just ignored *Symczyk*, 133 S. Ct. at 1529. Instead, it treated a FLSA collective action and a set of Rule 23(b)(3) classes "as if it were a single class action," largely because "there isn't a good reason" for Congress' different standards for certifying Rule 23(b)(3) (opt-out) class actions and (opt-in) FLSA collective actions; "[s]implification is desirable in law"; and Rule 23 promotes efficiency, which makes it "relevant" for collective actions too. *Espenscheid*, 705 F.3d at 772.

CONCLUSION

This Court should conclude that the district court properly applied Rule 23 and FLSA section 216(b) in this case.

Respectfully submitted.

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No. 14-1146

IN THE SUPREME COURT OF THE UNITED STATES

TYSON FOODS, INC.
Petitioner,

v.

PEG BOUAPHAKEO, et al., individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations representing manufacturers and those concerned with the fairness of the civil justice system. *Amici* are concerned that courts, such as the Eighth Circuit here, are relying upon statistical models and speculative theories of damages to certify overbroad class actions that include uninjured members. The potential impact of the decision below extends beyond Tyson's exposure in this action and outside wage-and-hour litigation. If left undisturbed, it would contribute to the growth of no-injury class actions and lead to an unwarranted increase in the legal and business costs of *Amici*'s members.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

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[1] The parties have filed a blanket letter of consent to *amicus curiae* briefs with the Clerk of the Court. Per Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

The Association of Home Appliance Manufacturers ("AHAM") is a not-for-profit trade association representing over 150 manufacturers of major, portable, and floor care residential appliances. The home appliance industry, with approximately 65,000 direct industry employees in the United States, contributes significantly to American jobs and economic security.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 600 companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial and regulatory matters affecting the petroleum industry in the United States.

The Metals Service Center Institute ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. MSCI's 400 member companies have over 1,500 locations throughout North America.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case to the extent relevant to the arguments made herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court warned against "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, instructing courts that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the *same injury*," not "merely that they have all suffered a violation of the same provision of law." 131 S. Ct. 2541, 2551, 2561 (2011) (internal citation omitted) (emphasis added). The Court further instructed in *Comcast Corp. v. Behrend*, that a model purporting to serve as evidence of damages in a class action must be closely tied to the injury on which liability is premised. 133

S. Ct. 1426, 1433-34 (2013). Despite these instructions, some courts, including the Eighth Circuit here, have continued to certify classes based on creative damage models and theories that give short shrift to this Court's rulings.

In the case before this Court, the Eighth Circuit improperly permitted the use of statistical sampling to create a fictitious "average employee" in a wage-and-hour lawsuit. Under the Plaintiff's own rose-colored methodology, more than two hundred class members had no injury at all. The jury verdict further suggested that Plaintiffs' sampling methodology resulted in "more than half of the putative class [having] suffered either no damages or only a de minimis injury measured in cents rather than dollars." *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 804 (8th Cir. 2014) (Beam, J., dissenting).

Rather than require Plaintiffs' counsel to narrow the definition of the class they sought to represent to only those with actual injuries, the court certified the class with the uninjured class members and included them in the aggregate damages award. "[E]ach purported class member, damaged or not, [would] receive a pro rata portion of the jury's one-figure verdict." *Id.* The legal shortcut here should be disallowed because it directly led to employees receiving awards when they had no viable claims or compensable injuries that could stand on their own.

The statistical modeling method used here is merely one way class action plaintiffs' counsel have developed to bring claims on behalf of individuals who have experienced no injury whatsoever. Variants of "no-injury claims" also arise in product liability, consumer protection, antitrust, data privacy, and

many other areas of law. As this brief discusses, some of these actions, as with the case at bar, improperly include a potentially large number of uninjured members based on creative damage models; others are based nearly entirely on uninjured classes because the "damages" are legal fictions created by the lawyers. In all of these cases, though, novel damage models and theories, when allowed, mask the inability of the vast majority of class members to fulfill core class requirements.

The practical impact of allowing claims of uninjured class members at any point in the litigation is antithetical to the purpose of Rule 23, which is to resolve claims efficiently and fairly where a multitude of people allege injury based on common facts and law. The presence of injured class members, regardless of how many, increase pressure on defendants to settle meritless claims, result in uninjured class members receiving windfall awards, and likely undercompensate individuals with actual losses because they have to share recovery with undeserving class members. Permitting certification of such no injury classes facilitates unwise regulation through litigation and litigation gamesmanship.

This Court can and should put a stop to such litigation abuse through its ruling in this case. It should make clear that class actions are not vehicles for awarding damages to individuals whose claims, if brought in their own names, would be dismissed. The Court should require that trial courts, as part of a "rigorous analysis" of class certification, obligate class counsel to tailor their class definitions to include only those who have experienced a common *injury*. This obligation to "right-size" class actions will

benefit workers and employers, consumers and product sellers, and the civil justice system as a whole by allowing the federal courts to produce fair legal outcomes. *Amici* respectfully urge the Court to reverse the decision below.

ARGUMENT

I. CREATIVE DAMAGE MODELS CANNOT BE ALLOWED TO SUBVERT SUBSTANTIVE AND PROCEDURAL REQUIREMENTS THAT FORBID CERTIFYING CLASS ACTIONS THAT INCLUDE UNINJURED PLAINTIFFS

The substantive and procedural requirements that class members suffer actual injuries common to the class compel district court judges to decline to certify purported plaintiff classes that include uninjured members. *See Comcast*, 133 S. Ct. at 1434. A person who is not injured does not have a cognizable claim. Creative damage models, including statistical sampling, cannot be allowed to distort class litigation by giving uninjured individuals the right to receive a compensatory award. As demonstrated by the failings here, when a class includes uninjured members, the court must deny or withdraw certification and require the plaintiff to narrow the proposed class to exclude those who have not experienced any injury.

A. A Formula Purportedly Showing that a Fictitious Average Class Member Suffered "Damages" Does Not Satisfy the Requirement that Each Individual Plaintiff Have a Concrete Injury

Injury-in-fact, a concrete injury capable of judicial resolution, is an indispensable requirement for any

individual seeking to establish a *prima facie* cause of action. Here, the Fair Labor Standards Act provides an employee with a cause of action to recover "unpaid overtime compensation" from his or her employer. 29 U.S.C. § 216(b). In order to bring a claim, an employee must establish that he or she has suffered the harm of unpaid overtime compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). An employee who has been properly paid is not entitled to compensation under the FLSA.

In this regard, the FLSA requires each plaintiff to "prove[] that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work." *Id.* at 687. The statistical sampling method used here undermines this core obligation. Plaintiffs fabricated an "average" employee and computed an aggregate award based on the fictional employee, regardless of any actual damages each employee sustained. The statistical sampling method obscured the fact that many plaintiffs had no injury, and the Defendant was denied its due process right to defend the individual claims. As a result, a multitude of workers who did not experience the alleged injury of unpaid time for donning and doffing equipment were nonetheless eligible for compensation.

Beyond the case at bar, injury-in-fact is a core substantive requirement for other actions commonly subject to class certification. For example, a leading treatise on tort law has explained that "[a]ctual loss or damage resulting to the interests of another" is a necessary element of common law causes of action. *See* W. Keeton, et al., Prosser & Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984); *In re Bridge-*

stone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."). The same is true for other federal causes of action. *See, e.g., Matsushita Elec. Ind. Co., LTD. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (requiring plaintiffs in antitrust cases to "show an injury to them resulting from the illegal conduct"); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311 (3rd Cir. 2008) ("Importantly, individual injury is an element of the cause of action"); *Amgem Inc. v. Connecticut Retirement Plans and Funds*, 133 S.Ct. 1187 (2013) (affirming that in securities actions a plaintiff must show injury caused by defendant's conduct).

Further, a plaintiff must demonstrate injury-in-fact to have Article III standing to bring a claim in federal court. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (referring to injury-in-fact as the "foremost" element of a claim). This Court has "always insisted on strict compliance" with this foundational requirement to ensure that each plaintiff is affected by his or her case "in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

The access to justice these laws collectively provide has become a hallmark of the American civil justice system. People can access the courts to seek redress for injuries, while courts are preserved for legal questions that can be addressed in concrete, factual contexts. Filing a lawsuit as a class action does not relax these requirements for individual injury. *See* 7 AA Charles Alan Wright, et al., Fed. Prac. & Proc. 3d § 1785.1 (2005) ("[T]he court must

be able to find that both the class and the representatives have suffered the same injury requiring court intervention."); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and] class actions . courts must be more careful to insist on the formal rules.").

It is unlawful for the class mechanism or an aggregation technique, such as statistical sampling, to be manipulated in ways that convert deficient claims into viable ones. A plaintiff without an injury cannot be permitted to hide among those who may. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). How, then, would a court be able to separate the wheat from the chaff without engaging in an individual assessment of injury? Such a task would defeat the very purpose of class actions and make class certification untenable.

B. The Procedural Mechanism Offered by Rule 23 May Not Be Manipulated to Hide Legal Deficiencies in Individual Claims

The Court should make clear that Rule 23 precludes certifying or maintaining certification of classes that include uninjured members at any time in the litigation. The mere presence at the outset of a case of a class representative who alleges an actual injury, along with the potential for class members to have suffered the same injury, does not clear the essential, but low hurdle that each class member be injured. As here, lawyers may identify class representatives who can allege injury, but are presenting creative damage theories to extend these allegations of harm to a multitude of uninjured class members. *See* Victor E. Schwartz & Cary Silverman, *The Rise*

of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?, 80 Brook. L. Rev. 599, 635 (2015).

Aggregation of litigation through a class action cannot sacrifice procedural fairness. Under Rule 23, class representatives must have claims typical of those that he or she purports to represent. For this to occur, as the Court has stated, lead plaintiffs and class members must "possess the same interest and suffer the *same injury*" for which they seek redress. *Wal-Mart*, 131 S. Ct. at 2550 (emphasis added). Aggregation techniques, including statistical sampling, must be continuously scrutinized and rejected when it becomes clear that they have swept into the litigation individuals that have experienced no harm.[2]

Certification of classes that include uninjured members violates Congress's instruction that procedural rules, including Rule 23, "shall not abridge, enlarge or modify any substantive right." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Rules Enabling Act, 28 U.S.C. § 2072(b)); *see also Wal-Mart*, 131 S. Ct. at 2561. Aggregation is valuable only when it resolves claims "without altering the substantive standard that would be applied were each claim to be tried independently." Principles of the Law of Aggregate Litigation § 2.02 cmt. D, at 89 (2010); *Shady Grove Orthopedics Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("A class ac-

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[2] The use of statistical modeling in particular can be a clear signal that the proposed class is simply not suitable for class treatment. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (finding that "shortcut" in using a "fictional typical" class member "should have been a caution signal to the district court that classwide proof of damages was impermissible").

tion leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *Lewis v. Casey*, 518 U.S. 343, 357-58 n. 7 (1996) (stating the obligation for injury "is no less true with respect to class actions than with respect to other suits").

Some circuits have properly followed this Court's instructions and the letter of the Rules Enabling Act, holding that classes with uninjured members do not satisfy Rule 23's commonality and typicality requirements. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing certification where plaintiffs' model for showing class-wide damages did not distinguish class members who were overcharged from those who were not overcharged and, therefore, not injured). These courts have recognized that when a class includes uninjured members, it must deny certification and require plaintiffs' counsel to redefine the overbroad class "in such a way as to include only members" who were injured as a result of the defendant's conduct. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012). A defendant must be able to fully present defenses to liability and damages.

They also have recognized that a district court's obligation to remove uninjured class members is a continual one. *See In re Deepwater Horizon*, 739 F.3d 790, 799 (5th 2014) (recognizing this requirement "becomes gradually stricter as the parties proceed through 'the successive stages of the litigation'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Should it become clear after certification that a class includes uninjured members, the court should expeditiously decertify and require counsel to narrow the class. *See* Fed. R.

Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

It is inappropriate to "kick the can down the road" by certifying a class under the premise that a defendant can later challenge the existence of injury, whether at trial, through individual proceedings on damages or a claims process. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 33 (1st Cir. 2015) (Kayatta, J. dissenting); *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability."). A "certify now, worry later" approach, in practice, will result in settlement of overbroad classes and compensation of uninjured class members. Plaintiffs should have the burden to address this issue concretely when seeking class certification so as to establish the absence of individualized issues as to the fact of injury that would render class adjudication impracticable. *See Wal-Mart*, at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance" with Rule 23).

The district court applied none of the above protections in the case before this Court. It should have denied certification because, even under the Plaintiffs' own damages model, at least two hundred class members were not injured. The district court's order that the defendant compensate these uninjured class members should be reversed.

C. The Court Should Establish a Bright Line Rule Against the Inclusion of Uninjured Class Members

Establishing a uniform, bright-line rule against the inclusion of any uninjured members in a class action is the only way to facilitate the fair and just resolution of such claims. As this Court has cautioned, class actions are not to be favored when a plaintiff cannot meet its burden of proof that class treatment is preferable. *Comcast*, 133 S. Ct. 1432 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979) (describing the class action mechanism as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only")). However, some courts are still not striking uninjured class members. Decisions that countenance including uninjured class members in certified classes have created widespread inconsistency in the law, with courts widely varying in how many uninjured class members can be ignored.

Consider, for example, the Seventh Circuit, which authored a leading opinion allowing uninjured class members. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). In *Kohen*, the circuit held that "a class should not be certified if it is apparent that it contains a *great many* persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677-78 (emphasis added). Another Seventh Circuit panel found that "[t]here is no precise measure for 'a great many.'" *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 819, 824-25 (7th Cir. 2012). A third panel held that even if class members were uninjured, their lack of injury was irrelevant to certification. *See Parko v. Shell Oil*

Co., 739 F.3d 1083, 1084-87 (7th Cir. 2014); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757-58 (7th Cir. 2014) (permitting certification of a class with uninjured members if the class representative's claim is not "idiosyncratic or possibly unique").

Confusion from the lack of a bright line rule among the courts is palpable, as many courts have searched for the right tipping point where the proportion of uninjured class members precludes certification. The First Circuit, for example, has found that not every class member must establish injury so long as the number of uninjured members is "de minimis." *In re Nexium Antitrust Litig.*, 777 F.3d at 21. Other courts have held that a class with uninjured members can be certified when "nearly all" class members experienced an injury, *see, e.g., In re Polyurethane Foam Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *17 (N.D. Ohio Nov. 17, 2014) (unredacted opinion of Apr. 9, 2014), 23(f) *pet. denied sub nom. In re: Carpenter Co.* (6th Cir. Sept. 29, 2014), *cert. denied sub nom. Carpenter, Co. v. Ace Foam, Inc.*, 135 S. Ct. 1493 (2015), or the plaintiffs' proposed method of proof promises to establish "widespread injury" to the class or show that a "substantial majority" of members were injured by the defendant's conduct. *See, e.g., Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 23 (D.D.C. 2012).

A common fault in these cases is an unwillingness to look beyond the veneer of the class certification motion to determine whether the damage models are plausible, or whether such models suppress the true number of uninjured claimants in order to expand the class or push the class over the threshold that the circuit uses. *See, e.g., Wolin v. Jaguar Land Rov-*

er N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (considering the lack of manifestation of a defect a merits issue not relevant to class certification); *Forcellati v. Hyland's Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding defendant's argument that products worked properly for some class members challenges the merits of plaintiff's allegations and has no bearing on class certification). In *Wal-Mart*, though, this Court clearly instructed that "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 131 S. Ct. at 2551-52. "Frequently, that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.*

Indeed, courts properly applying *Comcast* and *Wal-Mart* have recognized that "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" *In re Rail Freight*, 725 F.3d at 253 (citing *Comcast*, 133 S. Ct. at 1433). These courts have expressed that plaintiffs' damage models are often designed to create the largest sustainable classes and, therefore, are "prone to false positives." *Id.* "Attempts to meet the burden of proof using modeling and assumptions that do not reflect the individual characteristics of class members [should be] met with skepticism." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011). A damages model, at the very least, must be able to "measure the actual [injury] of individual class members." *Id.* at 267. "If the damages model cannot withstand this scrutiny then, that is not just a merits issue. [Plaintiffs'] models are essential to

the plaintiffs' claim they can offer common evidence of classwide injury." *In re Rail Freight*, 725 F.3d at 253. Damages models cannot be used to calculate an aggregate amount of damages for the class, then "absolve[ ] plaintiffs from the duty to prove each class member was harmed by the defendants' practice." *In re New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008).

This Court should clarify here that the pursuit of justice requires district judges to take the necessary steps throughout litigation to ensure that class actions are properly sized so that only people who are injured have access to the courts. The fictional "average" plaintiff theory used here does not survive this scrutiny. All class members are not identical to the average observed in the sample and should not have been paid as if they were, particularly anyone whose lack of injury should have disqualified them from being eligible for any award. The class action short cut works only when it leads to the same place as individually filed claims.

II. PROBLEMS CAUSED BY UNINJURED CLASS MEMBERS EXTEND FAR BEYOND WAGE-AND-HOUR LITIGATION AND STATISTICAL SAMPLING TECHNIQUES

In addition to the overbroad wage-and-hour class actions represented by the case at bar, class actions inflated by the presence of uninjured members have become significant sources of litigation abuse in other areas of the law. Specifically, *amici's* members are experiencing a surge in no-injury class actions based on equally creative theories of damages as statistical sampling over alleged product defects, marketing practices, and data breaches, among others.

The number of uninjured members can reach from the thousands to the millions.

In these lawsuits, class counsel will often define their classes to include anyone potentially affected by the alleged misconduct, such as a violation of corporate policy, statute, regulation or common law obligation. Certification of such an overly broad class is at best premature (because no genuine injury has occurred for the overwhelming majority of the class members), or at worst entirely meritless (because injury will never occur for them). By clarifying that Rule 23 requires courts to tailor how a class is defined to include only those who are truly injured, and exclude any plaintiff who could not sue in his or her own right, this Court can significantly reduce abusive "no injury" class litigation.

A. Product Claims By Consumers Whose Products Have Not Malfunctioned

Many of *amici's* members manufacture products. "No injury" class actions concerning product defects typically involve a product that may have malfunctioned for a few people, including the named plaintiffs, but has not caused any problems for the vast majority of consumers. *See generally* Schwartz & Silverman, 80 Brook. L. Rev. at 628-48. Many of these individuals are fully pleased with their products, but are swept into litigation seeking their right to collect for a risk that has not and likely will never materialize. While courts have been rightly skeptical of these class actions, too many "no injury" suits are still allowed.

In recent years, class counsel have become adept at disguising their "no injury" class actions under in-

ventive damage models and theories, much like the statistical sampling model at bar. For example, rather than bring claims only for those who have defective products, they may cleverly invoke a state consumer protection act to allege that all consumers, including those who are fully satisfied with their products, experienced a loss. In some cases, they suggest that the discovery of defect, even in only a few products, has created an economic loss for the entire class: the product's actual value at sale, given the potential for the defect, was lower than the purchase price, or the defect in some items has caused the entire line's resale value to diminish. *See id.* at 628-29. Some such claims have resulted in multi-million and billion dollar settlements. *See id.* at 629.

Recent, prominent examples of "no injury" product litigation have involved front-loading washing machines and automobiles, which are repeatedly targeted in such class actions.[3] When class members

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[3] Courts also have consistently rejected class actions against pharmaceutical manufacturers alleging creative theories of economic loss when the drug at issue worked without incident for, and may well have benefited, the class members. *See, e.g., Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) (holding plaintiffs lacked standing to seek reimbursement of value of drug found to have a risk of causing liver damage where only other patients may have experienced such harm and the class did not allege the drug caused them physical or emotional harm or that the drug was ineffective); *In re Vioxx Prods. Liab. Litig.*, 874 F. Supp. 2d 599, 601 (E.D. La. 2012) ("There is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm."); *Williams v. Purdue Pharm. Co.*, 297 F. Supp. 2d 171, 176-77 (D.D.C. 2003) (finding no injury in fact where class members suffered no ill effects or lack of efficacy from pain medication that was allegedly deceptively marketed); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 68-

do not have actual injuries, their claims should be rejected so courts can focus on those who do.

1. Washing Machine Litigation

The washing machine litigation involves allegations that all high-efficiency front-loading clothes washers are more likely than top-loading washers to develop mold and odors. About two dozen consumer class actions purporting to represent some ten million people have been filed in federal court against all major manufacturers of front-load washers. Although evidence presented by the manufacturers shows that the vast majority of purchasers never experienced any manifestation of the alleged defect, courts have certified, and appellate courts have affirmed, these extraordinarily broad class actions.

Specifically, courts have accepted the theory that the issue of defect is common to the class (even though some of the cases involved more than a dozen machine models), and that individual damages can be sorted out in proceedings *after* a determination of a defect or through a damages schedule. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *on remand*, 727 F.3d 796, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 412 (6th Cir. 2012), *cert. granted, judgment vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013), *on remand*, 722 F.3d

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69 (S.D.N.Y. 2002) (denying class certification where it was undisputed that the drug was "enormously beneficial to many patients" who "presumably got their money's worth and suffered no economic injury").

838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014). Some courts have implausibly suggested that the manufacturers should "welcome class certification" to *disprove* the allegations. *Whirlpool*, 722 F.3d at 857; *see also Butler*, 727 F.3d at 799 (reaffirming its prior finding that if "most members of the plaintiff class had not experienced any mold problem" then class certification will lead to "judgment that would largely exonerate Sears — a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment").

This Court is generally familiar with these cases, as it granted *certiorari*, vacated, and remanded two of them for reconsideration in light of *Comcast*. Nevertheless, in both of these cases, the Sixth and Seventh Circuits affirmed their earlier rulings, focusing on language in *Comcast* that requires a showing of predominance at the class certification stage and applied that holding only to liability, not liability and damages. *See Butler*, 727 F.3d at 800-01; *Whirlpool*, 722 F.3d at 856.

Whirlpool is one of the few class action defendants in recent years that took the risk of proceeding to trial. It won a favorable verdict in the first case. *See* Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*, Bloomberg Business, Nov. 5, 2014, *at* http://www.bloomberg.com/bw/articles/2014-11-05/whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come. Jurors found that the washers were not defective. *See Allison v. Whirlpool Corp.*, No. 1:08-WP-65001 (N.D. Ohio) (Verdict Form, Oct. 30, 2014).

More typical, however, is the path of BSH Home Appliances Corp., where the U.S. District Court for

the Central District of California certified classes that included purchasers of front-loading washers in four states. *See Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *leave to appeal denied sub nom, Cobb v. BSH Home Appliances Corp.*, 2013 WL 1395690 (9th Cir. Apr. 1, 2013), *cert. denied*, 134 S. Ct. 1273 (2014). After BSH exhausted its appellate options following class certification, the manufacturer settled the litigation. *See Tait v. BSH Home Appliances Corp.*, No. SACV 10-0711-DOC (Anx) (C.D. Cal. July 27, 2015) (Order Granting Plaintiffs' Motion for Attorney's Fees and Reimbursement of Expenses, and Plaintiffs' Request for Service Awards; Granting Plaintiffs' Motion for Final Approval of Class Action Settlement).

Under the settlement, any original purchaser of a Bosch or Siemens brand 27-inch front-loading washer, regardless of a mold issue, was eligible for a $55 payment. *See id.* at 5. Out of an estimated 650,000 class members, however, less than 3% of the class submitted claims, suggesting that most viewed their washing machines as properly working. *See id.* at 10. As a result, the attorneys who brought the lawsuit will end up collecting fees and costs (including $2.3 million in expert fees) equal to more than six times the funds actually distributed to washing machine owners. *See id.* at 26.

2. Unmanifested or Fixed Auto Defects

Courts frequently entertain class actions alleging that a car or truck has a defect that entitles all owners to compensation, even when the vehicle has worked (sometimes for years) without incident for most owners. These nebulous claims typically rely on expert testimony to present a theory of class-wide

damages, just as the case at bar involved sampling theories to create an average plaintiff. For example, some cases suggest that consumers paid for a "problem free" car or their resale value had fallen. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 634.

Often, these "no injury" class actions are perversely filed *after* a company has properly reported a potential problem, undertook a voluntary recall or repair program under the warranty, and offered to fix the problem free of charge. *See id.* at 653. For example, the Central District of California heard a purported class action where one of the class representatives testified in his deposition that after the manufacturer addressed an issue with his car's anti-lock brakes at no charge through a software update, he was "happy" and the car was "working fine." *See, e.g., In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1154, 1159 (C.D. Cal. 2013). Yet, he sought to represent a nationwide class of purchasers, claiming they did not receive the benefit of the bargain. The district court dismissed the case, properly finding that "[m]erely stating a creative damages theory does not establish the actual injury that is required to prevail on his product liability claims." *Id.* at 1157-58; *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (similar result).

Not all courts have taken the required approach of dismissing these class actions. *See, e.g., Daffin v. Ford Moto. Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (certifying a class when the class representative experienced a sticking throttle, but class as a whole had not). The "sudden unintended acceleration" cases involved about 400 people who alleged personal

injuries, wrongful death, or property damage from a defect in the cars that caused sudden acceleration; yet, they sued for an estimated 22 million owners. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 638. The class actions claimed that the *risk* of product failure led to a decrease in the resale value of their cars. *Id.* The federal court overseeing the multi-district docket for these claims found that the plaintiffs satisfied the minimum threshold for standing, regardless of whether they experienced the alleged defect, *see In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prod. Liab. Litig.*, 754 F. Supp. 2d 1145, 1161 (C.D. Cal. 2010), and declined to dismiss the plaintiffs' claims. 785 F. Supp. 2d 925, 932 (C.D. Cal. 2011). Toyota settled for $1.1 billion. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 638-40. The results were comparable to the washing machine cases. The law firms that brought the massive class actions would receive $200 million in fees, but only two percent of class members sought recovery. *See id.* at 640.

B. "No Injury" Consumer Class Actions Facilitate Improper Regulation Through Litigation

The threat of massive liability from "no injury" litigation, along with the negative publicity that often surrounds claims against consumer products, has also been used to "regulate" corporate conduct by securing settlements that include fundamental changes to business practices. In some situations, the changes achieved in these specious lawsuits have been studied and rejected in Congress and the appropriate federal agencies. *See* Robert B. Reich,

Regulation is Out, Litigation is In, U.S.A. Today, Feb. 11, 1999, at 15A.

This trend is exemplified by a recent surge of class actions against food makers. *See* Inst. for Legal Reform, The New Lawsuit Ecosystem: Trends, Targets and Players 89 (2013), *at* http://www.institutefor legalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf. These actions often target modern advances in food, including products sold by large agribusinesses and the use of genetically modified crops. The suits may, for example, allege consumer fraud for advertising such crops or products as "All Natural." Courts have certified classes even when evidence suggests that the label is not deceptive, there is no difference in the purchasing behavior of most individuals who saw a label with or without the phrase, or the use of this phrase was not important to people's actual purchasing decisions. *See, e.g., In re ConAgra Foods, Inc.*, -- F. Supp.3d --, No. CV 11-05379 MMM, 2015 WL 1062756, at *27, *64-65 (C.D. Cal. 2015).

In these cases, plaintiffs, with the aid of expert testimony, have sought to show an injury through complex models that purport to isolate the "price premium" stemming from the labeling. *See id.* at *67-71 (finding while one expert's "hedonic regression analysis" failed to isolate impacts of non-GMO labeling on price, in combination with a second expert's "conjoint analysis," plaintiffs damage methodology satisfied *Comcast's* requirements). Courts have dismissed some of the most extreme no-injury food class actions on various grounds. *See* Schwartz & Silverman, 80 Brook. L. Rev. at 657-61 (examining cases). Many of these food class actions, however,

have resulted in multi-million dollar settlements and changes to product labeling that satisfy the plaintiffs' own subjective preferences. *See id.* at 669-72.

C. The Burgeoning New Area of "No Injury" Data Breach Litigation

A new area of no-injury litigation is in the area of data security and privacy, where most individuals do not experience any injuries from a data breach.[4] As one analysis of the litigation found, "[t]here is no shortage of alternative theories upon which plaintiffs have brought suit," with the most common alleging negligence, breach of contract, and state consumer protection violations. *See* Zetoony, 2015 Data Breach Litig. Rep. at 8. In these class actions, few if any of the claimants have had any economic loss.

Many courts, following *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), have properly dismissed data breach classes with uninjured claimants. They have found that the loss or theft of data with personal information does not automatically give rise to a class action on behalf of every individual included on the computer, network, or file. Often,

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[4] Plaintiffs' lawyers filed approximately 110 class actions in federal courts alleging claims stemming from data breaches between July 2013 and September 2014, many of which target retailers. *See* David Zetoony et al., 2015 Data Breach Litig. Rep. 3 (Bryan Cave 2015), *at* http://bryancavedatamatters.com/wp-content/uploads/2015/04/2015-Data-Breach-Litigation-Report.pdf. They also filed 672 data privacy class actions (involving the collection, use, and sharing of information) in federal courts during this period, targeting every industry. David Zetoony et al., 2015 Data Privacy Litig. Rep. (Bryan Cave 2015), *at* http://bryancavedatamatters.com/wp-content/uploads/2015/05/2015-Privacy-Litigation-Report.pdf.

the creative damage models and theories are too speculative because it is unknown whether anyone actually accessed and used the plaintiffs' data. *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 40 (3d Cir. 2011). They have also found that a risk of future harm, identity theft, does not give standing because the vast number of people will not be affected. *See, e.g., In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, 45 F. Supp.3d 14, 26-27 (D.D.C. 2014) (compiling data breach class actions cases reaching similar conclusion); *Sam's East, Inc.*, No. 12-2618, 2013 WL 3756573, at *3 (D. Kan. July 16, 2013) (finding increased risk of identity theft is a "future-oriented, hypothetical, and conjectural" claim).

Inventive class action plaintiffs' attorneys have responded by developing new damages theories, which include statistical sampling, to create an "average" loss – much like in the case at bar. *See, e.g., In re Hannaford Bros. Co. Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying certification because plaintiffs had not developed expert testimony, but not postulating as to whether the modeling would have been valid if presented).

A recent decision in the Seventh Circuit decision throws fuel on the no-injury fire. The court ruled that class plaintiffs may proceed with a claim despite suffering no actual harm so long as there is a "substantial risk" of injury from the theft of their credit card information. *Remijas v. Neiman Marcus Group, LLC*, --- F.3d ---, No. 14-3122, 2015 WL 4394814, *4-5 (7th Cir. July 20, 2015).[5] The Seventh Circuit's opin-

[5] To its credit, the Seventh Circuit viewed the plaintiffs' other theories of injury as "more problematic," leaving their sufficiency to provide standing on their own "dubious." *Id.* at *6.

ion returns the case to the district court with instructions that may lead to the certification of a 350,000 member class action where only 9,200 (2.6%) experienced fraudulent activity and those that did had already been fully reimbursed. *See id.* at *1, *4.

Unless this Court takes a strong stance against "no injury" litigation, the Seventh Circuit ruling will be viewed as an invitation for class action claims any time personal information is compromised, without the need to show actual harm.[6]

III. CERTIFICATION OF CLASSES WITH UNINJURED MEMBERS LEADS TO DISTORTED OUTCOMES AND ENCOURAGES SPECULATIVE LITIGATION

As can be seen from the cases discussed in this brief, certifying class actions that are inflated with uninjured members hinders the ability of the American civil litigation system to generate sound results. The size of the actions increase the pressure on defendants to settle, the plaintiffs' attorney fees outpace class members' recoveries, and little, if any, attention is given to resolve claims of those with actual injuries. Ultimately, these cases undermine respect for the judicial system, as the public has come to view class action litigation as driven by the financial

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[6] The Court will have the opportunity to decide one variant of "no injury" data privacy litigation, considering whether a statutory violation can confer Article III standing upon a plaintiff who suffers no actual harm, in the next term. *Spokeo v. Robins*, No. 13-1339.

interests of lawyers rather than losses suffered by those they purportedly represent.[7]

In particular, this Court has explained that certifying a class "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (observing that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").[8] Justice Ginsburg has further observed that when "a class action poses the risk of massive liability unmoored to actual injury," the "pressure to settle may be heightened." *Shady Grove Orthopedic Assocs.*, 559 U.S. at 445 n.3 (2010) (Ginsburg, J., dissenting). Including uninjured class members or basing a class action on nearly all unin-

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[7] *See, e.g.*, Editorial, *Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions become the tool of plaintiffs lawyers who gin up massive claims in hopes that companies will settle").

[8] As courts have observed, "the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route." *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir. 1974) (Mansfield, J., concurring); *see also In re "Agent Orange" Prod. Liab. Litig.* 818 F.2d 145, 151 (2d Cir. 1987) (affirming $180 million class settlement even though it was clear the trial court "viewed the plaintiffs' case as . . . virtually baseless"); *cf.* Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (labeling "[s]ettlements induced by a small probability of an immense judgment in a class action" as "blackmail settlements").

jured members increases this coercion to settle. As a practical matter, there often is no opportunity to segregate out uninjured class members after class certification or at trial.[9] Defendants end up paying claims to people they have not injured.

These cases also create internal conflicts among class members by undercompensating individuals with significant losses. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (rejecting, in wage-and-hour suit, a proposal to extrapolate the experience of 42 "representative" employees to 2,341 class members who worked varying hours because it would confer a windfall on some members and undercompensate others). Some prominent observers suggest that lawyers purposefully exclude plaintiffs with significant injuries from class actions, preferring to reduce the claim to the lowest common denominator to obtain certification of the largest class with the greatest settlement leverage and potential for a lucrative fee award. *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act*, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 6 (Feb. 27, 2015) (statement of Chairman Goodlatte) (observing class members with injures have been "forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert").

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[9] When amending Rule 23 in 1996, the Advisory Committee on Civil Rules acknowledged the concern that class actions could be used "to coerce a defendant into settling rather than risking defeat and 'losing the company.'" *See* John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 351 (2005).

How this Court rules on this case will have a direct impact on the growing body of "no-injury" case law leading businesses to face an increasing number of highly speculative, creative class actions. American businesses already spend $2 billion on class action litigation per year. *See* Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3 (2015), *at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf. Now, approximately 54% of major companies are currently engaged in class actions, continuing an upward trend. *Id.* at 6. Labor and employment suits, including wage-and-hour cases such as the case before this Court, and consumer protection claims, as many *Amici* experience, constitute more than half of such class actions. *Id.* at 7.

Many plaintiffs in the case at bar, along with the other "no injury" suits discussed above, were likely satisfied with their pay, product or service. Creative theories of damages, including statistical models, cannot substitute for the need to show injury. By reversing the Eighth Circuit ruling, the Court can ensure that Rule 23 does not open a path to paying uninjured plaintiffs. The Court should provide a bright line rule requiring objective proof of injury and requiring courts to safeguard class actions from uninjured class members throughout a case. The public good of the American civil justice system can be achieved only when it reaches legally appropriate outcomes. When courts do not demand that each and every plaintiff show an actual injury to proceed with a claim and receive compensation, this goal is undermined. The result is not "access to justice," but removing the hinges from the courthouse doors.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Eighth Circuit and find that proper application of Rule 23 precludes certification of classes with uninjured members.

Respectfully submitted,

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No. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, Individually and On Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a),[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner. PLF was founded more than 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of class action procedures which harm businesses, and stifle entrepreneurialism and job creation. *See, e.g.*, *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970 (2012); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). The federal adversarial system is replete with procedural protections that ensure an individual's right to participate throughout litigation, and this Court has deemed a fair and adequate opportunity to be heard the most basic requirement of due process of law. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

While the class action device offers certain benefits—such as efficiency and deterrence—it also limits the ability of class members to participate in judicial proceedings. Class actions lawsuits are thus, by their nature, in tension with due process. Bearing that in mind, this Court has sought to protect the due process rights of both plaintiffs and defendants by requiring careful enforcement of Fed. R. Civ. P. 23's class certification requirements. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Such vigilance is all the more important given that class certification can have a coercive effect on defendants, and is often outcome-determinative. *See Newton v. Merrill Lynch, Pierce, Feiner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001).

One important component of Rule 23 is the requirement of commonality. Classes may not be certified unless "there are questions of law or fact common to the class" *and* those common questions are "capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551. In this case, the common issue—whether Tyson is liable to the class members for unpaid overtime—cannot be resolved on a classwide basis

because the answer depends on myriad facts unique to each plaintiff. The class contends that Tyson owes the members overtime pay for time spent donning and doffing work equipment. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 794 (8th Cir. 2014). But the class members worked in different positions, and the items they wore depended on their individual responsibilities, as well as their personal preferences. Pet. Br. at 5. Different employees chose to wear different materials, in different combinations, *id.*, and the time they spent donning and doffing depended not only on what they wore, but how they chose to put the pieces on. Tyson compensated employees for at least some of this time in different amounts, for different departments, during different years. *Id.* Yet, despite the fact that Tyson's liability could not be determined without reference to these many unique facts, the trial court certified the class. *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3793962, at *1 (N.D. Iowa Aug. 25, 2011) (denying motion for decertification).

Tyson was entitled to an individual assessment of liability based on the different circumstances of each plaintiff. But once the class was certified, the plaintiffs sought to prove liability and damages through a formula based on the average time it took a *sample* of the class to don and doff their equipment. Pet. Br. at 8. Deciding liability and imposing damages based on extrapolations from a sample of the class masks the differences among plaintiffs, and deprives defendants of their right to present individualized defenses. *Dukes*, 131 S. Ct. at 2555. The class should not have been certified, and a formula should not have been used to impose liability. The decision below must be overturned.

ARGUMENT

I

CLASS ACTION CERTIFICATION MUST BE SCRUTINIZED CLOSELY BY COURTS

A. Courts Must Strictly Enforce Rule 23's Commonality Requirement to Protect the Due Process Rights of All of the Parties

Essential to the American judicial system is the right to be heard and to participate in court proceedings. *Martin v. Wilks*, 490 U.S. 755, 762 (1989). But the class action device turns the normal adversarial system "on its head." Jay Tidmarsh, *Superiority As Unity*, 107 Nw. U. L. Rev. 565, 568 (2013). The claims of several individuals are consolidated, the process is streamlined, and the class members effectively lose the ability to decide "whether, when, where, with whom, and against whom to file." *Id.* Class members lose their ability to choose their counsel. And nearly every decision counsel makes benefits some class members at the expense of others. *See* John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 675-76 (2011) (demonstrating how in a fraud case, counsel's decision to emphasize certain facts affects class members disproportinately). Moreover, the aggregation of claims detracts from the acknowledgment of each plaintiff's particular injuries, a value recognized as a legitimate end in itself, apart from the goal of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions*

and Legislative Initiatives, 113 Harv. L. Rev. 1806, 1812-13 (2000).

Though in some class actions, class members are entitled to opt out and, in others, are even required to opt in, in practice, class members often do not appreciate the significance of such a decision, or exercise their right to opt out. Tidmarsh, *supra*, at 569. Thus while the class action device can provide benefits to class members, it also minimizes their ability to participate, and jeopardizes their due process rights—often without their consent.

In addition to compromising the due process rights of plaintiffs, the class action device also endangers the rights of defendants. Defendants have the right to pay damages only to those whom they actually harm. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) (defendants have "substantive right to pay damages reflective of their actual liability."). But "[t]he degree to which the factual assertions in the class complaint truly apply to each specific individual in the class will rarely be known" at the outset of litigation, and defendants' ability to make "idiosyncratic defenses arising from the specific circumstances of each plaintiff's situation" will often be impractical. Massaro, *supra*, at 677. Indeed, a class action defendant "may never get . . . due process unless the defendant is allowed to confront each class member in court, a possibility that goes against the very objective of class actions." Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 509 (2012).

A properly defined class is necessary to realize the procedural protections and benefits that the class action device offers. Individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Commonality ensures that the named plaintiffs and the absent class members' interests are aligned, and that class counsel and plaintiff advocate for outcomes that will benefit *all* class members. *Dukes*, 131 S. Ct. at 2550. Without the commonality requirement, class members with stronger-than-average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See, e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Commonality also reduces the likelihood that class members will be over- or under-compensated. By ensuring that damages awards are targeted to compensate what class members actually lost, commonality also protects the due process rights of defendants. Amy Gibson, Cimino v. Raymark Industries: *Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 Baylor L. Rev. 463, 475 (1994). Most importantly, commonality protects defendants' right to present individualized defenses, and to be free of liability to those they have not actually harmed. *Dukes*, 131 S. Ct. at 2555.

This Court has instructed courts to thoroughly analyze whether commonality and Rule 23's other requirements have been met before granting class certification. In *Comcast*, 133 S. Ct. 1426, the Court held that certification must be premised on evidence, not just the pleadings. Courts must make a "rigorous"

analysis into certification, even if that inquiry overlaps with the merits of the underlying claim. *Id.* at 1432. Again, this requirement is rooted in due process. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim.").

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011), emphasized that adherence to Fed. R. Civ. P. 23 is necessary to satisfy due process. In that case, the Court warned that imposing class arbitration without consent may violate the due process rights of absent class members precisely because, unlike courts, arbitral forums do not provide for protections like those provided for in Rule 23. Class actions, "by their very nature require a level of expertise in procedure" which must be provided in order to satisfy due process. Massaro, *supra*, at 683. Courts provide that expertise by enforcing Rule 23. *Concepcion*, 131 S. Ct. at 1746.

Thus, though the class action offers certain advantages, courts must scrutinize motions for class certification closely to protect the due process rights of both plaintiffs and defendants. These requirements may make it more difficult to certify a class, but that difficulty is the price our system pays for a fair administration of justice. Indeed, the Due Process Clause was designed exactly for the purpose of "protect[ing] the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

B. Courts Must Police Class Certification Closely Because of Certification's Coercive Effect on Defendants

Once a class is certified, litigation ending in a trial on the merits is "an exceedingly rare beast." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 12 (2014). Given that certification often means defendants run the risk of enormous damages awards, certification places them under irresistible pressure to settle. *See Newton*, 259 F.3d at 164 (after certification, defendant companies are under "hydraulic pressure" to settle). Few defendants have the stomach to proceed after certification, given the risk. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). And "[e]ven if a business litigates and wins, class actions can be extremely damaging to the business' finances and reputation."[2] Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 Ohio St. Entrep. Bus. L.J. 99, 100 (2013). Thus, class certification determinations are often outcome-determinative. *See Manual for Complex Litigation* § 30.1 at 212 (3d ed. 1995).

Because of its coercive effect, the class action procedure tends to result in targeted businesses facing what federal appellate judges bluntly term "blackmail."

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[2] Even though Wal-Mart won the certification issue in *Dukes*, "[a]midst mounting negative publicity, Dell, General Electric, and Starbucks toppled Wal-Mart from its perch atop the rankings to fourth place in Fortune's 2005 survey of America's Most Admired Companies." Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and A Silver Sixpence for Her Shoe*: Dukes v. Wal-Mart *& Sex Discrimination Class Actions*, 12 Cardozo J.L. & Gender 969, 994 (2006).

Rhone-Poulenc Rorer, 51 F.3d at 1298; *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995); *see also West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). This is true even when defendants are faced with weak claims, *Concepcion*, 131 S. Ct. at 1752, and defendants have a meritorious defense. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). When damages are aggregated and decided in one fell swoop, the risk of error will be too severe to accept. Thus, this Court and other courts have warned of the risk of "in terrorem" settlements that class actions elicit. *Id.*

Permitting certification in cases like this one, where it is not even certain that many class members have been injured *at all*, will flood the federal courts with "lawyers' lawsuits." The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). This danger is compounded when plaintiffs who have not been injured may join together in a class. "If passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984). In light of the coercive effect of class action certification, it is particularly important that courts scrutinize certification to ensure adherence to Article III so that defendants are not unfairly pressured into settling a case the named plaintiff had no right to bring in the first place.

The decision to certify is typically the defining moment in the litigation. By ensuring that classes are only certified in appropriate circumstances and where Article III is satisfied, the class certification stage acts as a bulwark against frivolous litigation intended to secure settlements. A court should order class certification only after conducting a rigorous analysis to ensure that the plaintiff seeking class certification has satisfied Rule 23's prerequisites.

II

THE LOWER COURT SHOULD NOT HAVE GRANTED CERTIFICATION IN THIS CASE

A. Common Issues Do Not Predominate

The class action device was created to allow a large group of individuals who have each suffered the same injury by the same defendant to group their claims together in a way that makes litigation economically efficient. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 477-78 ("[T]he theory of class actions is to take a weak signal and to amplify it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit."). It does not exist to allow claims of different natures and different degrees to be lumped together under a single label so as to confront a defendant with a wide variety of different allegations involving each class member's individual circumstances, thereby making defense impracticable. That kind of aggregation is not aggregation, but distortion, "the chief effect of which is to facilitate a finding of [liability] in cases where it is highly unlikely

to have occurred" as applied to every member of the class. Epstein, *supra*, at 509.

In order to qualify for certification under Fed. R. Civ. P. 23, a case must not only involve common questions, but the court must be able to answer those questions for the whole class. *Dukes*, 131 S. Ct. at 2551. Courts have therefore taken care to avoid certifying overtime cases in which a large group of plaintiffs alleges that a company failed to pay overtime, where each plaintiff performed different tasks and worked different hours, and where proof of a common policy alone would not necessarily prove that the defendant is liable to each class member. *See, e.g., Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009) (affirming denial of certification in overtime case); *Weigele v. FedEx Ground Package Sys., Inc.*, 267 F.R.D. 614 (S.D. Cal. 2010) (decertifying class that alleged failure to pay overtime because plaintiffs would need to "make a factual determination as to whether class members . . . actually perform[ed] similar duties," and were therefore all entitled to back pay). In such a case, there is no way to answer the question of liability without analyzing the individual circumstances of each plaintiff, and common questions do not "predominate."

For example, in *Vinole*, 571 F.3d at 947, the putative class alleged that the defendant mis-classified them as "exempt" employees and, as a result, impermissibly failed to pay them overtime and other wages. Liability turned on whether each employee was properly classified as exempt. But the answer to that question depended on the tasks the employees performed, and all of the plaintiffs had been granted "almost unfettered autonomy" to do their jobs.

Accordingly, the employees varied greatly in their daily routines. Thus, the common question could not be answered on a class-wide basis, because the answer depended on circumstances that varied from employee to employee. In order to determine actual liability, the court would "need to hold several hundred mini-trials with respect to each [employee]'s actual work performance." *Id.*

The plaintiffs argued that the burdens of such individualized adjudication could be mitigated through the use of " 'innovative procedural tools' such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, [or] expert testimony." *Id.* The trial court denied certification and the Ninth Circuit affirmed, on the basis that the issue of liability "requir[ed] a fact-intensive, individual analysis of each employee's exempt status." *Id.*; *see also McLaughlin*, 522 F.3d at 231 (rejecting certification where gross damages would have to be "roughly estimated" and defendants "only subsequently" would be able to challenge the individual claims); *Newton*, 259 F.3d at 191, *as amended* (Oct. 16, 2001) (no certification where plaintiffs could not prove reliance or injury on classwide basis unless a formula was used). Where liability turns on the unique circumstances of each plaintiff, the question of liability cannot be answered on a class-wide basis.

The same is true here. Resolution of this case would require the Court to inquire not only into whether Tyson had a policy of not paying for donning and doffing, but also what kind of equipment each employee donned and doffed, how much time it took

each individual to do so, and whether Tyson did compensate the individual for that time. In other words, the question of liability is entirely dependent on factors unique to each individual plaintiff. It was precisely because those factors differ in legally significant ways that the lower court used its statistical technique as a substitute for commonality. But Due Process does not allow such a substitute.

B. Defendants Were Entitled to Pursue Individualized Defenses Based on the Differences Between Class Members

Defendants are entitled to pursue individual defenses based on the differences between the plaintiffs.[3] *Dukes*, 131 S. Ct. at 2561; *Newton*, 259 F.3d at 191-92 ("Actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member."). Commonality protects that right. Where class members are similar, adjudication can be streamlined and presenting individual defenses is much easier. But where, as here, the plaintiffs are dissimilar and therefore not

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[3] As commentators have noted, this is not just a matter of due process, but an Article III standing requirement. The requirement that a plaintiff prove defendant injured her

> is not immediately concerned with whether a defendant ought to pay for her wrongs, either as a matter of punishment or deterrence. Rather, it is a requirement of standing[.] When defendant D argues that plaintiff P has suffered no injury . . . D is arguing that this plaintiff ought not be permitted a right of action because, even granted that D acted wrongfully, P has not actually been wronged by her, and that P having been wronged by D is a prerequisite to being entitled to legal recourse against her.

John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1643-44 (2002).

common, streamlining the process obscures the individual differences between plaintiffs and violates due process.

In *Dukes*, this Court overturned the lower court's use of trial-by-formula. 131 S. Ct. at 2560. In that case, the court of appeals had allowed the plaintiffs to determine the amount of back pay owed to the class as a whole by taking a sample set of the class members, determining the average award to those members, applying that amount to each class member, and coming up with an aggregate amount. *Id.* The Court rejected this process because it denied Wal-Mart the ability to present individual defenses. Likewise in *Summers*, 555 U.S. at 497-98, the Court rejected the use of statistical probabilities in establishing harm for purposes of Article III standing. The Court emphasized that the federal judiciary can resolve only actual disputes between actual persons, and that substituting statistical probabilities for a showing of real injuries would "make a mockery of our prior cases." *Id.* at 498.

Here, the trial and appellate courts sanctioned trial-by-formula, and imposed liability based on statistics derived from a sample of the class. Those statistics were then applied to the class as a whole to decide liability and determine damages. Whether Tyson was liable to the class—and if so, for how much—depended on the unique characteristics of each class member. Tyson was entitled to pursue individualized defenses based on those differences, and the trial-by-formula allowed below violates due process.

Statistical extrapolations simply cannot substitute for the individual weighing of the merits of specific

allegations. Even in mathematics, where they are a helpful tool, statistical models are, at best, easily misinterpreted, *see* Gary King, *How Not to Lie with Statistics: Avoiding Common Mistakes in Quantitative Political Science*, 30 Am. J. Pol. Sci. 666 (1986), and at worst, easily manipulated. *See* Darrell Huff, *How to Lie With Statistics* (1954).

Moreover, statistics, which rely on certain assumptions about the fungibility of cases and regularities between categories of data points, have no such parallel in law, where a plaintiff is required to prove each element of her case against each defendant. *See* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 Iowa L. Rev. 1001, 1052 (1988) ("An abstract ex ante causal probability associated with some possibly applicable causal generalization is not evidence of what actually happened on the particular occasion.").

For example, the presumption of innocence in law has no counterpart in statistics. The Constitution entitles defendants to confront their accusers and to a judicial determination of their own individual guilt or innocence. Criminal defendants could not be subjected to imputed guilt based on probabilities drawn from statistical patterns of guilt or innocence established in other cases or in hypothetical cases.

The same is true of civil defendants. As the Maine Supreme Court noted over a century ago,

> [q]uantitative probability . . . is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of the dice there

> is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown.

Day v. Boston & M.R.R., 52 A. 771, 774 (Me. 1902).

For instance, if two people are alone in a room with a valuable piece of artwork that is later found to be destroyed, there is 50% chance that each person destroyed it. To apportion liability on that basis without allowing either person to disprove the allegation that they committed the wrong, however, would violate due process. Statistics are tools that can be used to assess likelihood, but they are no substitute for the adversarial process of determining fault based on evidence and causation.

While statistical models may contribute to the plaintiffs' claim that an illegal policy is at work, plaintiffs must never be relieved of their burden of proving that the defendant committed the wrong, *i.e.*, that they each were injured by the defendant's acts—and that the damages approximate the injury caused. This Court recently reiterated that the Due Process Clause requires a court to focus on the liability of particular defendants to particular plaintiffs, and does not allow a court to base its decisions on wrongs allegedly done to others. *Dukes*, 131 S. Ct. at 2561; *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *see also* Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 Charleston L. Rev. 433, 450 (2008) ("[W]hile statistical sampling may provide more

detailed evidence of harm to others for purposes of the reprehensibility analysis, incorporating that information may ultimately be more prejudicial than probative to a jury likely to mistakenly infer they can punish for harm to others."). The possibility or even likelihood that an individual has been injured in a concrete and particularized way does not show an *actual* injury.

In addition, trial-by-formula will necessarily overestimate the damages owed to some plaintiffs and underestimate the damages due to others. Even if the formula accurately determines the defendant's total liability, by mismatching the damages owed, using a formula is problematic from a due process standpoint for both defendants *and* plaintiffs. Massaro, *supra*, at 674. Plaintiffs should be compensated according to their injury, and defendants should only pay for the damages they actually caused. *See* Tidmarsh, *supra*, at 1470 ("[T]he linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff."). Imposing damages by formula undermines both principles.

Here, the lower courts sanctioned exactly the type of trial-by-formula *Dukes* and *Summers* rejected. By basing liability on the average time that it took a sample of the class to put on and take off their unique equipment, then calculating damages in the aggregate by applying that formula to every member of the class, the courts denied Tyson its right to "*individualized* determinations of *each* employee's eligibility for back pay." *Dukes*, 131 S. Ct. at 2560. Though affording Tyson that right may be inconvenient, and undermine the efficiency and ease that the class action device is

meant to provide, "[t]he requirement of 'due process' is not a fair-weather assurance." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951). The lower courts' application of trial-by-formula to determine liability and damages must be overturned.

CONCLUSION

The decision of the Eighth Circuit should be *reversed*.

DATED: August, 2015.

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Tyson Foods, Inc. ("petitioner" or "Tyson").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that petitioner and respondents have entered blanket consents to the filing of *amicus* briefs.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in this case because the decisions below endorse the use of statistical sampling to satisfy the predominance requirement of Rule 23(b)(3) by generating a fictional "average" injury to be applied to each class member regardless of whether each one in fact sustained actual injury. This approach undermines Rule 23's requirements and results in classes in which a significant segment of the class has no injury. Moreover, acceptance of such proof in the face of clearly contrary evidence permits plaintiffs to impose liability on a defendant on behalf of class members who never could have proven the defendant liable in an individual trial – in derogation of the Due Process Clause and the Rules Enabling Act. The holdings below also contravene *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and other recent Supreme Court precedent. For all of these reasons, they should be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below is one of several appellate court rulings over the last few years that have essentially elevated fiction over fact, endorsing class actions based on expert testimony that is at odds with actual facts, and thereby paving the way for uninjured class members to be compensated for injuries they never experienced.

Plaintiffs, current and former employees at Tyson's pork-processing plant in Iowa, allege that Tyson failed to compensate them for overtime spent donning and doffing personal protective equipment ("PPE"), violating the Fair Labor Standards Act ("FLSA") and the Iowa Wage Payment Collection Law ("IWPCL"). Pet. at 6. Plaintiffs claimed that they could prove Tyson undercompensated all class members using the following common proof: (1) a study by Dr. Kenneth Mericle that purportedly calculated the average amount of time Tyson employees spent on donning/doffing activities by measuring the time it took a small and non-representative sample of employees to do so; and (2) a calculation by Dr. Liesl Fox of the aggregate overtime compensation owed, which assumed that all class members spent the average amount of time calculated by Dr. Mericle and applied that amount to Tyson's pay records for the class members. *Id.* at 7-8.

The district court agreed, even though the record showed that the employees' donning and doffing activities varied widely. In fact, at the trial that ensued, the few class members who testified confirmed that each wore different PPE depending on their jobs and personal preferences – and that they

spent different amounts of time, ranging anywhere from two to twelve minutes, each time they engaged in donning/doffing activities. *See* Pet. at 9, 16 (citing Tr. 598, 611, 634, 641, 705-06, 708-09). Moreover, Dr. Fox testified that even if Dr. Mericle's calculated averages were applied to every class member, the class included over 212 members who did not suffer any injury because the additional time still did not result in those employees working more than 40 hours in a single week.

A divided panel of the Eighth Circuit upheld class certification and a classwide verdict of $2,892,378.70, which totaled $5,785,757.40 with the addition of liquidated damages. *See* Pet. App. 6a. While the majority echoed the district court's observation that "individual plaintiffs varied in their donning and doffing routines," Pet. App. 8a, the court held that plaintiffs could rely on the "inference" that they each spent the "average donning, doffing, and walking times" calculated by Dr. Mericle in order to calculate an aggregate amount of uncompensated work time, *id.* 11a. In embracing this inference, the Eighth Circuit endorsed a class that included at least *hundreds* of uninjured employees by plaintiffs' own expert's count. Indeed, the number is likely even higher because, as Judge Beam explained in his dissent, the jury ultimately awarded less than half the damages plaintiffs requested based on their experts' calculations, indicating that the jury disagreed with plaintiffs' "over-generous time study conclusions" and that "well more than one-half of the certified class" was unlikely to have been actually injured. Pet. App. 125a.

Certification of such a heterogeneous class infringed Tyson's due-process rights by stripping it of

its right to challenge the fundamental injury element of the individual class members' claims. In addition, by eliminating the substantive requirement of injury solely by dint of the class device, the Eighth Circuit violated this Court's command, based on the Rules Enabling Act, that Rule 23 not be interpreted to "'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

If left to stand, the Eighth Circuit's ruling would significantly harm American manufacturers. The use of statistical sampling where, as here, there is a strong record that any alleged harm is individualized opens the door to over-compensation – i.e., payments to individuals who were never injured by a defendant's conduct. Such a regime will promote more abusive and costly litigation that will damage American businesses and their shareholders and employees, as well as the consumers who buy the products they make. This Court should reverse the circuit court's error to prevent these results.

ARGUMENT

I. The Eighth Circuit's Decision Endorsed A "Trial By Formula" That Abridged Tyson's Due-Process Rights And Violated The Rules Enabling Act.

The Eighth Circuit's decision to affirm class certification based on unrepresentative, statistical sampling evidence was erroneous because it undermined Rule 23's requirements for class certification and foreclosed Tyson's right to contest individual class members' claims, in violation of its due-process rights and the Rules Enabling Act.

As this Court made clear in *Wal-Mart Stores, Inc. v. Dukes*, a basic prerequisite of a class action is that the plaintiff must "demonstrate that the class members 'have suffered the same injury.'" 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). This is a demanding requirement, particularly in the context of Rule 23(b)(3), which is "an adventuresome innovation" that is designed "for situations in which class-action treatment is not as clearly called for." *Id.* at 2558 (internal quotation marks and citation omitted). Where the evidence shows that some members of the class are not injured, class treatment is improper because any certified class must preserve the defendant's right to present "defenses to individual claims," a right rooted both in the Rules Enabling Act and basic notions of due process. *Id.* at 2561; *e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (mem.); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. [N]o reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (internal quotation marks and citations omitted); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action must "leave[] the parties' legal rights and duties intact and the rules of decision unchanged").[3]

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[3] Although the FLSA claim was allowed to proceed as a "collective" action rather than class action pursuant to the Act's collective-action provision, it is clear that the same uniformity of injury is required. As the Eighth Circuit recognized, before a collective action is approved, a court must determine that the members of the collective action are "similarly situated," which

This Court has already squarely held that the right to defend against individual claims precludes the use of expert evidence based on a "sample set of the class members" to prove classwide injury unless the defendant's right to present individualized defenses is preserved. *Dukes*, 131 S. Ct. at 2561. As the Court explained, such a "novel project" of "Trial by Formula" contravenes the defendant's right to litigate its defenses. *Id.* And as the Court again emphasized two years later, courts have a duty to rigorously analyze expert evidence offered to prove classwide injury or damages at the class-certification stage. The Court expressly rejected the notion that "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Comcast*, 133 S. Ct. at 1433. Rather, any model purporting to outline the compensation due to each class member must be consistent with the scope of liability the plaintiff is attempting to prove as to each class member. *Id.* at 1434-35.

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requires consideration of "'(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations.'" Pet. App. 7a (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001)). *See also, e.g., DeSilva v. N. Shore-Long Island Jewish Health Sys.*, 27 F. Supp. 3d 313, 327-328 (E.D.N.Y. 2014) (explaining that, in an FLSA action, it "is senseless to proceed as a collective action when Plaintiffs' experiences vary from day to day, and from individual to individual" because the defendant "will not have an opportunity to meaningfully cross examine opt-in Plaintiffs," depriving it of its "due process right to present its full defense").

The courts below directly contravened these precedents by endorsing the use of "average" damages uniformly on behalf of all members of a heterogeneous class. Most fundamentally, the lower courts erred by approving class treatment even though a significant number of uninjured individuals stood to recover compensation solely by dint of the class device. The crux of plaintiffs' claims was that they were deprived of overtime pay in violation of the FLSA and the IWPCL. *See* 29 U.S.C. § 207(a)(1); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (explaining that an FLSA plaintiff had "the burden of proving" that he performed work "for which he [or she] was not properly compensated"); Iowa Code § 91A.3. And as plaintiffs' experts conceded, *hundreds* of employees were not owed any compensation under plaintiffs' theory of the case because, for example, they donned and doffed during compensated production time or (even including the donning and doffing time) worked fewer than 40 hours a week and thus had no unpaid overtime. *See* Pet. at 11, 18. As a result, and as recognized in Judge Beam's dissents below, the district court's judgment stands to award compensation to hundreds of individuals with no legally cognizable injury, Pet. App. 22a, 24a, 126a, in effect enlarging substantive rights and violating Tyson's due-process rights by forcing it to pay individuals to whom it is not liable under the applicable substantive law.[4]

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[4] This approach likewise abridges the rights of any class member who worked more than the alleged average amount of uncompensated time and thus would be entitled to seek more extensive relief in individual proceedings.

The Eighth Circuit brushed these concerns aside, asserting that plaintiffs' experts were permitted to make an "inference" that each individual employee was injured and spent the same amount of time donning and doffing PPE as the fictional "average" employee in Dr. Mericle's time study. Pet. App. 8a. The court believed that use of such an inference was allowable under *Anderson v. Mt. Clemens Pottery*. *See* Pet. App. 8a. But *Anderson* held no such thing. Indeed, *Anderson* expressly confirmed that an employee suing under the FLSA has a "burden" to show "that he has *in fact* performed work for which he was improperly compensated." 328 U.S. at 687 (emphasis added). It is only the "amount and extent" of such uncompensated work – i.e., damages, not injury itself – that may be proven "as a matter of just and reasonable inference." *Id.* And even as to such inferential proof, the defendant has a right "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88.

Under this framework, plaintiffs' expert evidence fell far short of establishing uniform injury – notwithstanding *Anderson* – for several reasons. For one thing, *Anderson*'s inference applies at most to damages, not injury. In other words, the inferences made by plaintiffs' experts could serve only to prove the extent or amount of damages for plaintiffs who had already proven they worked uncompensated hours and were uncertain only as to the number of those hours. Moreover, even if *Anderson* were construed more broadly to permit an inference of injury as well as the extent of damages, no such inference would support class treatment here because any in-

ference was "negative[d]" by plaintiffs' expert's own testimony, which conceded that *hundreds* of class members had not suffered any injury. No inference of universal injury could survive this concession; to hold otherwise would effectively make the inference irrebuttable and eliminate the element of injury from the plaintiffs' claims, in violation of Tyson's due-process rights and the Rules Enabling Act. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 446, 452-53 (1973); *Francis v. Franklin*, 471 U.S. 307, 317 n.5 (1985) (explaining that an "*irrebuttable* presumption" goes beyond mere burden-shifting and "eliminates an element from the case"). In short, the class never should have been certified because plaintiffs had no evidence to satisfy the threshold requirement that "the class members have suffered the same injury." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks and citation omitted).

Even if universal class injury could somehow be "inferred," plaintiffs' evidence still could not support class treatment because it failed to account for the significant variations within the class with respect to donning and doffing times. The seed for this fatal flaw was in the design of the damages model, which was not based on a representative sample of the class. By his own admission, Dr. Mericle failed to ensure that his sample pool of workers represented proportionally the different jobs held by the putative class members. *See* Pet. at 10 (citing Tr. 1105-08, 1050). Indeed, Dr. Mericle failed to use any sampling formula employed in statistical analyses at all; he and his team merely observed whichever employees were around and performing donning/doffing activities. *See id.* (citing Tr. 912).

The failure to use a representative sample resulted in a corresponding failure to account for differences in donning and doffing time by position, despite the fact that Tyson's facility employs 1,300 employees, performing over 420 distinct jobs in two different departments, which entail the use of different sanitary items and PPE. *See id.* at 4; *id.* at 10 (citing Tr. 1105-08, 1050). Indeed, even Dr. Mericle testified that these differences led to "'a lot of variation'" because "'some of [the workers] put on more equipment than others.'" *Id.* at 9 (quoting Tr. 1158, 1144). For example, his observed times for processing floor employees donning their PPE ranged from half a minute to ten minutes and his observed times for slaughter floor employees doffing their PPE ranged from 0.2 to 5.7 minutes. *Id.* at 9 (citing Pet. App. 137a, 138a). As such, plaintiffs' approach to proving damages was impermissible because it offered no assurance that the damages model was based on estimates of excess hours worked that matched – or even approached – the hours actually worked by the class. *Cf. Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (concluding that "what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

In this respect, the lower courts committed the same type of error that this Court identified and corrected in *Comcast*. As the Court explained in that case, a damages model that was based on four theories of liability was not a valid basis for certification of a class that was proceeding on only one of those theories because "a model purporting to serve as evidence of damages in [a] class action must measure

only those damages attributable to" the operative theory of liability. 133 S. Ct. at 1433. And if "the model does not even attempt to do that, it cannot possibly" be used to prove class damages. *Id.* Here, too, plaintiffs' experts did "not even attempt" to measure damages in a manner that aligned with the limited scope of injury to each class member they acknowledged resulted from the plaintiffs' theory of liability and, on this additional ground, the courts below erred in sustaining class certification.

For all of these reasons, the Court should reverse and in doing so, remind the lower courts that use of statistical sampling to satisfy class certification requirements is improper, particularly where it leads to the inclusion of uninjured class members in the certified class.

II. The Eighth Circuit's Decision Is Damaging To American Businesses And Consumers.

The decision below also cries out for reversal because its imprudent approach to predominance and embrace of overbroad classes will promote the filing of unwieldy, overbroad class proceedings, to the detriment of American businesses, their workers and shareholders, and consumers.

As Tyson notes, the same issues of overbreadth and misaligned damages models presented by this case frequently arise in consumer-fraud class actions. Pet. at 31-32. Indeed, relying on logic similar to the Eighth Circuit's here, the Sixth and Seventh Circuits sanctioned class actions in two recent washing-machine cases despite record evidence that the vast majority of the class members never experienced the product defect asserted by the named plaintiffs. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir.

2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013). As one commentator has noted, while this Court "has been taking steps to eliminate these overbroad class actions," "a misapplication of precedent by the circuit courts has rendered the Supreme Court's efforts futile." Christine Frymire, *Class Actions a Thing of the Past . . Or Are They? A Look at the Circuit Courts' Application of Comcast v. Behrend*, 48 J. Marshall L. Rev. 335, 336-37 (2014).

As demonstrated by the facts in this case, overbroad class actions undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they could not recover if they brought a similar lawsuit as individuals. And in a consumer-fraud class action, recovery by uninjured consumers results in overcompensation, which is as much a problem for consumers as it is for businesses. In general, the potential costs of injury and damages to a small number of consumers are "incorporated into the price of the product and spread among" a large group of purchasers. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991). But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers and other businesses are required to hike the price of goods and services in order to remain solvent. *See id.* The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price in the first instance." *Id.* As Judge Easterbrook similarly explained in the Seventh Circuit's decision in *Bridge-*

stone/Firestone, allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions and injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 n.1 (7th Cir. 2002).

Overbroad class actions and the high litigation costs that come with them also adversely affect employees by restricting businesses' ability to allocate resources to creating new jobs and expanding sales. *See, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted). This sort of economic distortion – which Judge Wisdom saw "little reason to adopt" – is exacerbated by overbroad class actions.

Recognizing these dangers, some courts have rejected overbroad class actions. For example, a number of federal courts have staunchly applied the typicality requirement of Rule 23 to bar class certification unless everyone in the class has suffered the same alleged injury. *See, e.g., Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *20-21 (D.S.C. Dec. 21, 2012) (recognizing that the proposed nationwide class "would . . . include those persons and entities who never experienced

problems" with their vehicles, highlighting "the lack of typicality among putative class members"); *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987, at *14 n.2 (S.D. Cal. June 19, 2014) (commonality and typicality not satisfied where the proposed class was "woefully overbroad because it incorporate[d] class members who suffered injury and those that did not"). Nonetheless, and despite this Court's precedents, overbroad classes are becoming more prevalent.

The Court should reverse the decision below to clarify that overbroad class actions are impermissible and to prevent the harm caused by such actions to our judicial system, our economy and American manufacturers, consumers, and workers.[5]

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[5] Notably, the Seventh Circuit has already witnessed the problems inherent in an embrace of overbroad class actions like the one in this case. In litigation alleging that Pella windows contain a defect making them prone to leaking, the defendant opposed certification on the ground that the class was overbroad because most windows did not manifest any problem. Nevertheless, the Seventh Circuit held that certification was proper on the theory that the issue of defect was common to the class – even if the alleged defect never manifested in most windows. *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (per curiam). The result was a settlement in which virtually none of the class participated and attorneys were awarded fees that were nearly ten times greater than the maximum aggregate class recovery – an outcome the Seventh Circuit lamented as "inequitable – even scandalous." *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (noting that 225,000 notices were sent to class members but only 1276 claims were made, resulting in a total claim of $1.5 million by class members compared to a fee award of $11 million). This Court should recognize what the Seventh Circuit has not – that such "scandalous" outcomes are the inevitable result of the certification of overbroad cases like this one.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Tyson Foods, Inc., the Court should reverse the decision below.

Respectfully submitted,

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August 14, 2015

APPENDIX A

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Altria Client Services Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
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Cooper Tire & Rubber Company
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GlaxoSmithKline
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Kawasaki Motors Corp., U.S.A.
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Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company

Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teleflex Incorporated
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation

Zimmer, Inc.

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF INTEREST[1]

Amicus Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and in its experience the class action device is often the only meaningful way that individuals can vindicate important legal rights.

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only *Amicus* and its attorneys have paid for the filing and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief. A copy of that consent is on file with the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus respectfully asks this Court to reaffirm that the procedural nature of an action—individual versus class—cannot alter substantive legal rules. And in part because this general principle includes the rule set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the judgment below should be affirmed.

* * *

Petitioner Tyson Foods, Inc. ("Tyson") effectively asks this Court to render advisory holdings untethered to the facts and claims at issue in this case, and unnecessary to evaluating the judgment below. But this Court does not decide issues "superfluous to the decision in the present case" and "unpredictable in [their] application and consequences." *Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Scalia, J., concurring); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions.").

Specifically, Tyson and many of its *amici* ask this Court to reach out beyond the issues necessary to decision in this particular case to prescribe a series of rules for (and, indeed, largely *pro*scribe) the use of inferential proof, in particular inferential statistics, in *all* class litigation, as distinct from individual litigation. *Cf.* Federal Judicial Center, *Reference Manual on Scientific Evidence* ("Reference Manual")

(3d ed. 2011) (containing guidelines for the use of statistics in *all* litigation). Rendering the expansive ruling Tyson and its *amici* urge would be inappropriate and ill-advised.

Even apart from this Court's institutional restriction against abstract policy-making, it should reject the result Tyson and its *amici* seek. Tyson would have this Court create and impose a *different*, and particularly stringent, set of substantive legal rules applicable, apparently, only in class litigation, that do not apply in individual litigation asserting the very same claim. In so doing, Tyson turns a core principle undergirding the Federal Rules—articulated in the Rules Enabling Act—on its head: a class action "merely enables a federal court to adjudicate claims of multiple parties at once," and "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (Scalia, J.) (plurality opinion) (citing 28 U.S.C. § 2072(b)).

Tyson's jeremiad against the *general* use of inferential proof in class actions, moreover, is impossible to square with the well-considered rule that the probative value of a particular type of evidence *must* be assessed on a case-by-case basis, and in light of the applicable substantive legal principles at issue. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (explaining, with respect to statistical proof, that the usefulness of statistics "depends on all of the surrounding facts

and circumstances" and observing that there are an "infinite variety" of statistics).[2]

A hypothetical variation of the present case highlights the problem with Tyson's attempt to ratchet up the burden of proof here beyond what would be required outside of the class or collective action context. Suppose a group of employees at Tyson's Storm Lake plant filed a multi-plaintiff complaint identical to Ms. Bouaphakeo's actual complaint, but without the class and collective action allegations. And suppose that, as here, the employer violated its duty to maintain appropriate records, utterly failing to keep or preserve the best (and only) source of precise individual evidence. Further suppose that, at trial, those plaintiffs presented both representative testimony and a study demonstrating how much time the average employee spent donning and doffing such gear. Such evidence would unquestionably be permitted as a matter of controlling substantive law: when an employer fails to keep proper records, employees can prove their cases by inference. *See Anderson*, 328 U.S. at 687-88. The same proof in the same circumstances should lead to precisely the same result in a class action. The fact that this is a class and collective action rather than an individual action does not—indeed, *cannot*—alter settled substantive federal and state law. *See Shady Grove*, 559 U.S. at 408 (Scalia, J.) (plurality opinion).

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[2] *Amicus* also disagrees with Tyson's characterizations of the specific evidence in this case, but notes that the sufficiency of evidence is not before the Court.

ARGUMENT

I. THIS COURT DOES NOT ISSUE ABSTRACT POLICY PRONOUNCEMENTS REGARDING THE PERMISSIBILITY OF PARTICULAR TYPES OF EVIDENCE IN LITIGATION.

As a matter of first principles, this Court decides only the case before it. *Geraghty*, 445 U.S. at 403; *accord Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."). As then-Judge Roberts well put it: "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (concurring in part and concurring in the judgment). Tyson and its *amici*, however, ask this Court to issue broad pronouncements regarding class actions and the use of statistics in them. *See, e.g.*, Br. of the Chamber of Commerce of the U.S.A., Bus. Roundtable, & Retail Litig. Ctr., Inc. as *Amici Curiae* in Support of Pet. 15-16 (attacking "statistical analysis for purposes of litigation *particularly [] in connection with class action claims*" (emphasis added)); Br. for DRI—the Voice of the Defense Bar as *Amicus Curiae* Supporting Pet. 27 (asking this Court "to strictly circumscribe, if not outright prohibit," statistical

extrapolation as a means to support class certification).[3]

The scope of these requests is as breathtaking as it is unfounded: they vastly exceed the questions presented by the wage-and-hour litigation before the Court and are not the type of "sharply presented issues in a concrete factual setting" that would allow this Court to evaluate their merits. *Geraghty*, 445 U.S. at 403.

A broad ruling restricting the use of appropriate inferential proof in class litigation, moreover, would unduly impede lower courts' ability to assess the appropriateness of particular evidence in the context of specific cases. *See* Br. of Civ. Pro. Scholars as *Amici Curiae* in Support of Neither Party ("Scholars Br.") 25-36 (arguing same). *Amicus* thus respectfully asks this Court to adhere to its "considered practice not to decide abstract, hypothetical or contingent questions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 90 n.22 (1947) (internal quotation marks omitted).

II. THE BURDENS OF PROOF IN CLASS LITIGATION ARE THE SAME AS THOSE IN INDIVIDUAL LITIGATION.

Even taken on their own terms, the particular standards of proof Tyson and its *amici* seek should be rejected. Among other things, they seek to impose restrictions on the use of inferential statistics and

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[3] Tyson's other *amici* make similarly broad requests. *See infra* Section III.

other inferential proof in class litigation that simply do not apply to individual litigation. Yet class plaintiffs are required to prove no more (and no less) than are plaintiffs in individual litigation. *See Shady Grove*, 559 U.S. at 406-07 (plurality opinion) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge nor modify any substantive right,' § 2072(b)."); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution.") (footnote omitted).

Take, for example, the use of inferential proof to establish damages. As indicated above, Tyson and its *amici* broadly attack well-established inferential, representative, and aggregate forms of proof (what they classify as "averages"). *See, e.g.*, Pet. Br. 9-10 (criticizing the district court for calculating damages based on the average amount of time employees spent donning and doffing rather than investigating precisely how much time was spent by each employee, despite Tyson's unlawfully failing to keep individual records).

Amicus respectfully urges this Court to reject that extreme position, in part because it would establish that class plaintiffs are required to meet an

entirely different burden of proof than are individual plaintiffs. *See Anderson*, 328 U.S. at 687-88; Pet. App. 5a & n.2 (explaining that Iowa and federal claims require the same proof); *cf., e.g., Shady Grove*, 559 U.S. at 408 (plurality opinion) (explaining that class plaintiffs and individual plaintiffs must meet the same standard of proof); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

Tyson's demand for some higher level of precision of proof in all cases (or, at least, all *class* cases), moreover, is foreign to our legal system. As Judge Higginbotham well explained for an en banc Fifth Circuit:

> In countless areas of the law weighty legal conclusions frequently rest on methodologies that would make scientists blush. The use of such blunt instruments in examining complex phenomena and corresponding reliance on inference owes not so much to a lack of technical sophistication among judges, although this is often true, but to an awareness that *greater certitude frequently may be purchased only at the expense of other values.*

League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 860 (5th Cir. 1993) (en banc) (emphasis added); *see also Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015) ("Truth be told, we cannot be sure why

the Master selected the exact number he did But then again, any hard number reflecting a balance of equities can seem random in a certain light.").

Of particular relevance here, no jurisdiction requires an individual to prove her damages with the precision Tyson seeks. *See* Appendix A (containing citations from all fifty states and the District of Columbia for the proposition that damages need not be proven with precision under all circumstances). This is so in part because, under the Seventh Amendment, damages are "a matter so peculiarly within the province of the jury that the Court should not alter it." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009) (Thomas, J.); *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 453 (1996) (Scalia, J., dissenting) (same); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758-60 (7th Cir. 2011) (Posner, J.) (accepting "statistical, probabilistic" proof to establish liability and explaining fundamental rule that "broad latitude is allowed in quantifying damages, especially when the defendant's own conduct impedes quantification" (internal quotation marks omitted)).

Similarly, as plaintiffs "need not make [a Rule 23] showing to a degree of absolute certainty," *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012), there can be little doubt that they can use statistics and other inferential proof to help demonstrate that class certification is appropriate. That showing requires, at most, a

preponderance of the evidence.[4] And, of course, once a class has been certified, plaintiffs need only prove their claims by a preponderance of the evidence. *See, e.g., Shady Grove*, 559 U.S. at 408 (plurality opinion).

The above principles not only support the lower court's judgment in this particular case, but also underscore that this Court should reaffirm that class and individual plaintiffs are held to the same standards of proof.

III. WHETHER INFERENTIAL PROOF IS APPROPRIATE TURNS ON A CAREFUL ASSESSMENT OF THE LAW AND FACTS OF A PARTICULAR CASE.

A. Inferential statistics are essential in numerous areas of the law, in both class and individual actions, where the facts and law render them probative.

Tyson and its *amici* attempt to turn the battle over the use of a specific methodology in *this* case into a war over the propriety of using sampling, representative testimony, and other inferential proof

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[4] *See, e.g., id.*; *Brown v. Nucor Corp.*, 785 F.3d 895, 931-32 (4th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013). Some courts have indicated that an even *lower* standard may apply. *See, e.g., Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 418 (6th Cir. 2012). It does not appear that any court has ever suggested it could be higher.

both writ large and, in particular, in class actions. To that end, they urge this Court to, among other things, "remind the lower courts that use of statistical sampling to satisfy class certification requirements is improper," Br. of the Prod. Liab. Advisory Council, Inc. as *Amicus Curiae* in Support of Pet. 12; "instruct the lower courts and litigants about the dangers inherent in statistical methods," Br. of Trans Union LLC as *Amicus Curiae* in Support of Pet. 15 (capitalization altered); and dramatically expand this Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), to hold that any extrapolation from the average of a sample to help determine a defendant's liability is inherently "flawed," Br. *Amicus Curiae* of Atl. Legal Found. and the Int'l Ass'n of Def. Counsel in Support of Pet. 22.[5]

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[5] *See also* Br. of Wal-Mart Stores, Inc. as *Amicus Curiae* in Support of Pet. 5 (asking the Court to "hold expressly that the use of extrapolation, sampling, and averaging to relieve individual class members of their burdens of proof and to foreclose the litigation of individualized defenses is incompatible with due process"); Br. for Ass'n of Am. R.R.s as *Amicus Curiae* in Support of Pet. 20 (advocating for adoption of a radical standard for class certification requiring that all "individualized rebuttal evidence can be excluded as irrelevant or repetitive"); Br. *Amicus Curiae* of the Equal Emp't Advisory Council in Support of Pet. 14 (asking the Court to hold that, without a "precise" measure of damages, class certification "typically is improper in similar wage and hour cases"); Br. for the Dow Chem. Co. as *Amicus Curiae* in Support of Pet. 18 (urging the elimination of statistical averaging to show the propriety of class certification); Br. of *Amici Curiae*

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In other words, Tyson and its *amici* would have this Court abandon its prior jurisprudence and condemn the use of the "infinite variety" of statistical evidence the Court has long embraced, *Teamsters*, 431 U.S. at 340, in one broad stroke. The Court should refrain from making any such generalized (and incorrect) pronouncement, and instead adhere to its longstanding measured and

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Nat'l Ass'n of Mfrs., All. of Auto. Mfrs., Ass'n of Home Appliance Mfrs., Am. Tort Reform Ass'n, Am. Petroleum Inst., and Metals Serv. Ctr. Inst. in Support of Pet. 10 n.2 ("The use of statistical modeling in particular can be a clear signal that the proposed class is simply not suitable for class treatment."); Br. *Amicus Curiae* of Pac. Legal Found. in Support of Pet. 15 ("Even in mathematics, where they are a helpful tool, statistical models are, at best, easily misinterpreted, and at worst, easily manipulated." (citation omitted)).

These attacks are all the more remarkable given that corporations often use statistical techniques internally to resolve important factual issues and to make precise pricing and marketing decisions. *See, e.g.*, James Guszcza & John Lucker, *Irrational Expectations: How statistical thinking can lead us to better decisions* (2009), *available at* http://dupress.com/articles/irrational-expectations-statistical-thinking-for-better-decisions/; Thomas H. Davenport & Jeanne G. Harris, *Competing on Analytics: The New Science of Winning* 28 (2007) (quoting CEO of Capital One Financial Corporation: "It's all about collecting information on 200 million people you'd never meet, and on the basis of that information, making a series of very critical long-term decisions about lending them money and hoping they would pay you back.").

case-specific approach to assessing the propriety of statistical evidence.

Such assessments should not, moreover, turn on whether a case is a class or non-class action. Rather, they must turn on (i) what the statistical or other inferential evidence is being offered to show and (ii) the governing law with respect to the claims at issue (the importance of which is particularly manifest in this context, where substantive law for decades has provided for exactly the type of proof required given exactly the type of burdens at issue in this wage-and-hour case).

1. Statistics play a critical role in enforcement of employment law.

This Court has "emphasized the useful role that statistical methods can have" in demonstrating an adverse impact or a pattern of discrimination in Title VII cases. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988). Indeed, "[o]nce the employment practice at issue has been identified," the plaintiff "*must* offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 994 (emphasis added). Further, the appropriateness of using statistical evidence reflects, at least in part, the nature of the alleged wrongdoing. In "many" employment-discrimination cases, "the *only* available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *Teamsters*, 431 U.S. at

339 n.20 (emphasis added) (internal quotation marks omitted).[6]

Inferential proof in the form of statistics can also be used in individual employment discrimination cases. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for instance, the Court established "the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* at 800. In discussing how the plaintiff could show that the employer's stated reason for the adverse employment action was pretextual, the Court explained that potentially relevant evidence could include the company's "general policy and practice with respect to minority employment," and noted "statistics as to [defendant]'s employment policy and practice may be helpful to a determination of whether [defendant]'s refusal to rehire [plaintiff] in this case conformed to a general pattern of discrimination against blacks." *Id.* at 804-05. As a leading treatise explains, "[s]tatistics may be used in an attempt to establish or rebut a prima facie case of disparate impact discrimination or classwide intentional or pattern-

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[6] *See also, e.g., Brown*, 785 F.3d at 903-04. In *Brown*, plaintiffs' expert developed "an alternative benchmark" for showing a policy of discrimination for part of the class period. This benchmark used a statically appropriate sample of certain representative evidence because the employer had not kept the actual data. The Fourth Circuit explained that the statistical evidence was "methodologically sound while yielding results that satisfy *Wal-Mart*'s heightened requirement of commonality." *Id.* at 903.

or-practice discrimination, or to assist in showing that the defendant's articulated reasons for an individual employment decision are pretextual
It can be useful, but generally is not determinative on the question of discriminatory intent in individual cases." Barbara T. Lindemann, Paul Grossman, C. Geoffrey Weirich, *Employment Discrimination Law* 35.II (5th ed. 2012).

2. Statistics are vital to the enforcement of antitrust law.

In the antitrust arena, too, statistics often play a critical role in proving elements of the claim, as well as damages. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 606 (1985) (in non-class case, evidence included "statistical measures of consumer preference"); *Resco Prods., Inc. v. Bosai Minerals Grp.*, No. 06-235, 2015 U.S. Dist. LEXIS 124930, at *12 (W.D. Pa. Sept. 18, 2015) ("multiple regression analysis—when performed properly—is a mainstream tool in economic study and an accepted method of estimating damages in antitrust litigation").

Inferential proof is also used to satisfy Rule 23's requirements. *See, e.g., Messner*, 669 F.3d at 808 (vacating order denying class certification where plaintiffs offered "economic and statistical methods" to demonstrate predominance with respect to antitrust impact of subject merger, and rejecting district court's determination that plaintiffs' proposed methodology "required proof that defendant raised its prices at uniform rates affecting all class members to the same degree"); *In re*

Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2015 U.S. Dist. LEXIS 125540, at *83-84 (E.D. Pa. Sept. 18, 2015) (certification of proposed subclass was warranted where, *inter alia*, plaintiffs "laid a sufficient foundation for the inferential finding that the impact reflected in the single average overcharge was shared by virtually every class member"); *cf. Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (indicating models are appropriate to show antitrust damages at the class-certification stage and at trial, so long as they are "consistent with [plaintiff]'s liability case").[7]

3. Statistics allow investors to show causation and damages in securities fraud litigation.

Statistical analysis is also often critical to investors' ability to prove causation and damages under the Securities Exchange Act of 1934 and SEC Rule 10b-5. Event studies, "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events," typically play a key role in determining whether plaintiffs can invoke the "fraud-on-the-

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[7] *See also In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 222-25 (M.D. Pa. 2012) (holding that plaintiffs proffered sufficient classwide damages methodology using "econometric models," and rejecting defendants' assertion that damages could not be measured on a classwide basis "because highly individualized inquiries [we]re necessary to calculate the vagaries of trade spend (which materially affects the actual net price paid by each class member)").

market" presumption, which rests on the premise "that the price of stock traded in an efficient market reflects all public, material information—including material misstatements." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405, 2415 (2014); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 241-50 (1988) (adopting the presumption); Madge S. Thorsen, *et al.*, *Rediscovering the Economics of Loss Causation*, 6 J. Bus. & Sec. L. 93, 109 (2006).

If successfully invoked, the presumption serves as "a replacement for person-specific proof of reliance and causation." *Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010) (Easterbrook, C.J.). Both class and non-class plaintiffs can avail themselves of the presumption, so long as its prerequisites—primarily market efficiency—are established. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (observing that "fraud on the market is a substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b-5 plaintiff" and that the theory also "facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market").

Courts often rely on such expert regression analysis in assessing market efficiency.[8] Indeed,

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[8] *See, e.g.*, *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634-35 (3d Cir. 2011) (upholding district court's finding of causal relationship based on an event study conducted by plaintiffs' expert, which showed 60% and 65% correlations between news releases and price changes in DVI stock and notes), *abrogated in part on other grounds*

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"[a]n event study that correlates the disclosures of unanticipated, material information about a security with corresponding fluctuations in price has been considered *prima facie* evidence of the existence of such a causal relationship." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 207-08 (2d Cir. 2008). Further, defendants themselves often provide competing expert analyses to attempt to demonstrate a *lack* of market efficiency. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2015 U.S. Dist. LEXIS 97464, at *33 (N.D. Tex. July 25, 2015) (whether lack of price impact had been shown "largely turn[ed] on the competing methodologies of the parties' experts").

Statistical analyses are also often employed as proof of other elements of Rule 10b-5 claims—"loss causation," *i.e.*, "that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss," *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) (emphasis in original), and damages. *See FindWhat*

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by Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013); *Schleicher*, 618 F.3d at 682-88 (affirming grant of class certification where, *inter alia*, "[a] financial economist concluded, in an expert report that the district judge credited, that the market for Conseco's shares was efficient, as *Basic* employs that term"); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512-18 (1st Cir. 2005) (upholding grant of class certification where plaintiffs' expert "presented the results of a sophisticated event study analyzing how Xcelera stock price reacted to company-specific events").

Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1313 (11th Cir. 2011) ("As acknowledged by the Defendants' expert, event studies are a common method of establishing loss causation, used routinely in the academic literature to determine whether the release of particular information has a significant effect on a company's stock price." (internal quotation marks omitted)); *In re DVI, Inc. Sec. Litig.*, No. 03-5336, 2014 U.S. Dist. LEXIS 129136, at *22 (E.D. Pa. Sept. 15, 2014) ("generally, expert testimony is required to establish 'both the fact of damage and the appropriate method of calculation'" (quoting *Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 301 (3d Cir. 1991)).

4. The importance of statistics goes beyond employment, antitrust, and securities law.

Litigants use statistics to prove causation and damages in various other legal contexts. *See, e.g., In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 42 (1st Cir. 2013) (Lynch, C.J., Lipez, Souter, JJ.) ("[C]ourts have long permitted parties to use statistical data to establish causal relationships"), *cert. denied sub nom. Pfizer Inc. v. Kaiser Found. Health Plan, Inc.*, 134 S. Ct. 786 (2013). And, as in the decisions discussed above, courts have accepted statistical evidence as probative in both class and non-class cases. *See, e.g., id.* at 29; *United States v. Valencia*, 600 F.3d 389, 427 (5th Cir. 2010) (per curiam) (observing that multiple-regression analysis "is a powerful tool when the trier of fact must

determine whether a causal link exists").[9] *See generally* Reference Manual at 214 ("[M]ost statistical methods relied on in court are described in textbooks or journal articles and are capable of producing useful results when properly applied.").

In *Neurontin*, for example, the First Circuit affirmed a verdict of more than $140 million for the insurance company Kaiser, which had been the victim of drug-maker Pfizer's fraud relating to off-label marketing. *See* 712 F.3d at 25. In affirming the verdict, the court of appeals noted that Kaiser's "primary evidence" on causation consisted of an expert's use of "aggregate data and statistical approaches to link patterns in promotional spending to patterns in prescribing for the drug." *Id.* at 29. (internal quotation marks and footnote omitted). The court of appeals also rejected Pfizer's argument that "the aggregate statistical evidence presented by [Kaiser's expert] was insufficient to show causation (or injury) as a matter of law, and inadmissible." *Id.* at 41-45.

The frequent use of statistical evidence across numerous areas of the law, in both class and non-class cases, furthers *Amicus'* point that courts should evaluate such evidence under two guiding principles: first, a class plaintiff's burden of proof is no more stringent than it would be in an individual action, *Shady Grove*, 559 U.S. at 406-407; and second, there is no "one-size-fits-all" rule or test that could account for the "infinite variety" of statistics, *Teamsters*, 431

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[9] For a compilation of other contexts in which statistics are used, *see* Scholars Br. 28-30.

U.S. at 340, and the numerous ways in which they can appropriately be utilized. Accordingly, this Court should limit its ruling to the specific methodologies employed in *this* case, and reject Tyson's call for expansive pronouncements concerning aggregate proof, such as statistical evidence. And, when assessing the methodologies of proof employed by plaintiffs in this case, this Court should not apply a more stringent standard than it would if the Tyson employees were (for example) in a multi-plaintiff case.[10]

B. This Court should likewise adhere to its consistent reluctance to adopt specific methodologies or degrees of precision governing the use of statistical evidence.

Amicus respectfully submits that, just as this Court should refrain from making broad, generalized, or abstract statements regarding statistical evidence, it should likewise maintain its historical reluctance to adopting specific methodologies or endorsing particular quantitative or qualitative standards that statistical evidence must satisfy in order to be deemed probative. The Court's existing jurisprudence strongly favors such a circumspect approach.

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[10] In such a case, like the class and collective action here, those plaintiffs would rely, appropriately, on the settled law that, once the employer failed to keep appropriate time, they were relieved of their burden to prove precisely how much they worked. *See Anderson*, 328 U.S. at 687-88.

The Court's opinion in *Bazemore v. Friday*, 478 U.S. 385 (1986), is instructive.[11] That case addressed alleged racial discrimination in employment and provision of services by the North Carolina Agricultural Extension Service. *See id.* at 398. Plaintiffs "relied heavily on multiple regression analyses designed to demonstrate that blacks were paid less than similarly situated whites." *Id.* at 398. Specifically, an expert "prepared multiple regression analyses relating to salaries" for three years, and certain of those regressions "used four independent variables—race, education, tenure, and job title." *Id.* The regressions "purported to demonstrate that in 1974 the average black employee earned $331 less per year than a white employee with the same job title, education, and tenure, and that in 1975 the disparity was $395" (the regression for 1981 showed a smaller, not statistically significant, disparity). *Id.* at 399 (citations omitted). The district court rejected that evidence as proof of discrimination, and the Fourth Circuit affirmed "because the plaintiffs' expert had not included a number of variable factors the court considered relevant," including "across the board and percentage pay increases which varied from county to county." *Id.* (internal quotation marks omitted).

This Court reversed, holding that the court of appeals' determination with respect to the statistical evidence "was erroneous in important respects." *Id.* at 400; *see also id.* ("A plaintiff in a Title VII suit

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[11] To be precise, *Amicus* cites Justice Brennan's concurrence, which was joined by all Members of the Court, when discussing *Bazemore*.

need not prove discrimination with scientific certainty. [but merely] by a preponderance of the evidence."). The Court explained that a regression analysis is not "unacceptable as evidence of discrimination" simply because it does "not include *all* measurable variables thought to have an effect on salary level." *Id.* (internal quotation marks omitted). While such an omission might render an "analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable as evidence of discrimination." *Id.* (internal quotation marks omitted). The Court further explained that "[w]hether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden *will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant*." *Id.* (emphasis added).

The Court's reasoning in *Bazemore* accords with its refusal in other cases to endorse limiting principles with respect to when, and in what manner, statistical evidence can be employed. *See, e.g., Berghuis v. Smith*, 559 U.S. 314, 330 n.4 (2010) (declining Michigan's invitation "to adopt the absolute-disparity standard for measuring fair and reasonable representation and to requir[e] proof that the absolute disparity exceeds 10% to make out a prima facie fair-cross-section violation" (alteration in original; internal quotation marks omitted)); *Watson*, 487 U.S. at 995 n.3 (observing that "we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of

employment discrimination" and that "our formulations have never been framed in terms of any rigid mathematical formula"); *Basic*, 485 U.S. at 248 n.28 (explaining that, in adopting the fraud-on-the-market presumption, "we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price"); *Anderson*, 328 U.S. at 687-88 (holding that an employee need only produce[] sufficient evidence to show the amount and extent of work as a matter of just and reasonable inference").

At bottom, this Court has long adhered to a case-specific approach to assessing the value of statistical evidence and other inferential proof. *See Teamsters*, 431 U.S. at 340. It should do so again here.

CONCLUSION

The standard of proof in class litigation is—and must be—no different than that in individual litigation. Tyson and its *amici* wrongly seek to unduly restrict, or eliminate, the use of inferential proof in class litigation even when that very same evidence would be sufficient in an individual case. *Amicus* respectfully asks this Court to affirm the judgment below and reaffirm that the procedural nature of an action does not alter substantive legal principles.

September 29, 2015

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APPENDIX

Appendix A

No jurisdiction requires a plaintiff to establish damages with complete precision.

(internal citations omitted)

State	Case
Alabama	*Long-Lewis, Inc. v. Webster*, 551 So. 2d 1025, 1027 (Ala. 1989) "[T]he amount of damages must be established with reasonable certainty. However, reasonable certainty is sufficient to support an award of damages; and absolute certainty is not required."
Alaska	*Cameron v. Chang-Craft*, 251 P.3d 1008, 1021 (Alaska 2011) In breach of contract actions a "plaintiff must present to the jury evidence sufficient to calculate the amount of the loss caused by the breach." In other words "the law does not require absolute precision, it requires only a reasonable basis for the award."

State	Case
Arizona	*Atkinson v. Marquart*, 541 P.2d 556, 558-59 (Ariz. 1975) [W]e must start from the proposition that once the fact of damage is established, proof of the amount thereof may be established with some lesser degree of certainty.
Arkansas	*Shelton v. Shelton*, 752 S.W.2d 758, 761 (Ark. 1988) In *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, we noted that in some instances damages cannot be proved with exactness, and in those cases we do not reverse if the cause and existence of damages have been shown despite the inability to prove precisely what the plaintiff has lost.
California	*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 102 P.3d 257, 266 (Cal. 2004) Not only must such damages be pled with particularity, but they must also be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision."

State	Case
Colorado	*Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 244 (Colo. 2003) Any doubts regarding the certainty of non-economic damages are resolved against the party in breach, and the court may consider circumstances such as willfulness in deciding whether to require a lesser degree of certainty, giving greater discretion to the jury's findings.
Connecticut	*Naples v. Keystone Bldg. & Dev. Corp.*, 990 A.2d 326, 335 (Conn. 2010) "The plaintiff has the burden of proving the extent of the damages suffered Although the plaintiff need not provide such proof with [m]athematical exactitude the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate . "
Delaware	*Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 557 (Del. 2006)

State	Case
District of Columbia	*Campbell v. Fort Lincoln New Town Corp.*, 55 A.3d 379, 387-88 (D.C. 2012) A plaintiff must "establish both the fact of damages and the amount of damages with reasonable certainty." The proof need not be mathematically precise, however; what is required is "some evidence which allows the trier of fact to make a reasoned judgment" rather than an award based on "speculation or guesswork."
Florida	*Shulgasser-Parker v. Kennedy Trinley & Santino, P.L.*, 71 So. 3d 152, 153 (Fla. Dist. Ct. App. 2011) "If damages have been suffered, lack of precise proof as to the exact amount will not be fatal so long as the proof supports the monetary loss determined by the finder of fact and is not merely speculative."

State	Case
Georgia	*John Thurmond & Associates, Inc. v. Kennedy*, 668 S.E.2d 666, 672 (Ga. 2008) "Regardless of the measure of damages, however, the fair market value of the property must be proven, and, although exact figures are not necessary, the trier of fact must be able to 'reasonably estimate (the fair market value) without resort to guess-work.'"
Hawaii	*Bachran v. Morishige*, 469 P.2d 808, 810-11 (Haw. 1970) [W]e held that the court should instruct the jury "that if it is unable to determine by a preponderance of the evidence how much of the plaintiff's damages can be attributed to the defendant's negligence, it may make a rough apportionment", and "that if it is unable to make even a rough apportionment, it must apportion the damages equally among the various accidents."

State	Case
Idaho	*Mueller v. Hill*, 345 P.3d 998, 1004 (Idaho 2015), *reh'g denied* (Apr. 13, 2015) "[E]vidence is sufficient if it proves the damages with reasonable certainty."
Illinois	*Lovewell v. Schlick*, 171 N.E.2d 99 (Ill. App. Ct. 1960)
Indiana	*Remington Freight Lines, Inc. v. Larkey*, 644 N.E.2d 931, 942 (Ind. Ct. App. 1994) The law is well settled that, in a tort action, it is not necessary that the verdict reflect precise mathematical certainty.
Iowa	*Pavone v. Kirke*, 801 N.W.2d 477, 495 (Iowa 2011) [I]f the uncertainty merely lies in the amount of damages sustained, "'recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.'"
Kansas	*Huffman v. Thomas*, 994 P.2d 1072, 1078 (Kan. Ct. App. 1999) Kansas law is clear that the plaintiff does not need to prove the amount of pecuniary damages to any level of mathematical certainty.

State	Case
Kentucky	*Middleton v. PNC Bank, NA*, 2014 WL 5510872, at *5 (Ky. Ct. App. 2014) "Kentucky law does not require [a plaintiff] to provide exact calculations of its damage—an estimation may suffice if it proves damages with 'reasonable certainty.'"
Louisiana	*Daigle v. City of Shreveport*, 78 So. 3d 753, 770 (La. Ct. App. 2011) The plaintiff bears the burden of proving special damages by a preponderance of the evidence. In meeting her burden of proof on the issue of future medical expenses, the plaintiff must show that, more probably than not, these expenses will be incurred and must present medical testimony that they are indicated and the probable cost of these expenses.
Maine	*Estate of Hoch v. Stifel*, 16 A.3d 137, 151 (Me. 2011) We will disturb an award of damages "only when it is plain that there is no rational basis upon which the amount of the award may be supported, that is, when there is no competent evidence in the record to support the award."

State	Case
Maryland	*Carter v. Wallace & Gale Asbestos Settlement Trust*, 96 A.3d 147, 157 (Md. 2014) "The Maryland cases are in accord with the prevailing rule elsewhere: that if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture[.]"
Massachusetts	*Don v. Soo Hoo*, 912 N.E.2d 18, 23 (Mass. App. Ct. 2009) Although "proof of damages does not require mathematical precision, it must be based on more than mere speculation."
Michigan	*Hannay v. Dep't of Transp.*, 860 N.W.2d 67, 87 (Mich. 2014) This Court does not "preclude recovery [of damages] for lack of precise proof" or "require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable," particularly in circumstances in which the defendant's actions created the uncertainty.

State	Case
Minnesota	*Holb-Gunther, LLC v. Van Tech Corp.*, 2009 WL 2746176, at *5 (Minn. App. 2009) A plaintiff bears the burden of proving the existence of lost profits "to a reasonable certainty" and the amount of those damages "to a reasonable probability."
Mississippi	*Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 50 (Miss. 1998) "'[A] reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case, and which will enable the trier to arrive at a fair approximate estimate of loss is sufficient proof.'"
Missouri	*Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting Inc.*, 279 S.W.3d 179, 185-86 (Mo. 2009) Because lost profits are of a character that defies exact proof, the trial court had a greater degree of discretion to weigh the lost-profits award based on common experience demonstrating that a substantial pecuniary loss has occurred.

State	Case
Montana	*Tractor & Equip. Co. v. Zerbe Bros.*, 199 P.3d 222, 231 (Mont. 2008) [W]hile a damages judgment "must be supported by substantial evidence that is not mere guess or speculation," "mathematical precision is not required."
Nebraska	*Lesiak v. Cent. Valley Ag Co-op., Inc.*, 808 N.W.2d 67, 76-77 (Neb. 2012) [D]amages are not required to be proved with mathematical certainty, "'but the evidence must be sufficient to enable the trier of fact . to estimate with a reasonable degree of certainty and exactness the actual damages . '"
Nevada	*Bhan v. Das*, No. 60896, 2013 WL 7158500, at *1 (Nev. Nov. 1, 2013) Das was not required to 'prove [his] damages with mathematical precision; [he] need only establish a reasonable basis for ascertaining those damages.'

State	Case
New Hampshire	*Palazzi Corp. v. Stickney*, 619 A.2d 1001, 1004 (N.H. 1992) Palazzi cites *Peter Salvucci & Sons Inc. v. State* for the proposition that '[t]he use of a formula can be an acceptable method of proving damages.' Such use of a formula, however, is not acceptable when it is based on unsupported numbers and when precise measurement of damages is possible[.]
New Jersey	*Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 722 (N.J. 2007) [T]he proposed class asserts violations of the Wage and Hour Law, which directs employers to compensate employees who work in excess of forty hours a week with an overtime rate of "1 ½ times" the employees' regular hourly wage. Uncertainty regarding damages does not foreclose such claims.

State	Case
New Mexico	*Sunnyland Farms, Inc. v. Cent. New Mexico Elec. Co-op., Inc.*, 301 P.3d 387, 396 (N.M. 2013) The majority of jurisdictions allow unestablished business plaintiffs to collect lost profit damages if they can prove with reasonable certainty the fact of lost profits The dollar amount of lost profit damages, however, does not require the same level of proof.
New York	*Kenford Co. v. Erie Cnty.*, 493 N.E.2d 234, 235 (N.Y. 1986) [T]he alleged loss must be capable of proof with reasonable certainty.
North Carolina	*Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 620 S.E.2d 222, 231 (N.C. Ct. App. 2005) Plaintiffs must prove damages to a reasonable certainty. In cases where a claim for damages from a defendant's misconduct are shown to a reasonable certainty, the plaintiff should not be required to show an exact dollar amount with mathematical precision.

State	Case
North Dakota	*Johnson v. Monsanto Co.*, 303 N.W.2d 86, 93 (N.D. 1981) We believe that Johnson's proof on these items of damage failed in [part because t]he amount of these damages was not proved with a reasonable degree of certainty We realize that the amount of the damages does not require proof to a degree of mathematical precision; however. the jury must have some factual basis for fixing damages.
Ohio	*Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.*, 453 N.E.2d 683, 686 (Ohio 1983) The nonbreaching party must establish the fact of damage and then sustain its burden of proof as to the amount of damage by proof on any reasonable basis.

State	Case
Oklahoma	*Johnson v. Ford Motor Co.*, 45 P.3d 86, 91 (Okla. 2002) Rather than require the plaintiff to prove precisely and exactly those injuries which are attributable to the accident and those which are attributable to the alleged design defect, we determined that: 1) the plaintiff should be required to prove by a preponderance of the evidence the extent of the enhanced injuries resulting from the defect; and 2) the manufacturer is liable for damages only for injuries which resulted from the defect.
Oregon	*N. Pac. Lumber Co. v. Moore*, 551 P.2d 431, 435 (Or. 1976) It is well settled that plaintiff is not required to prove the amount of his damages with mathematical certainty. He need only establish the fact of damage and evidence from which a satisfactory conclusion as to the amount of damage can be reached.

State	Case
Pennsylvania	*E. Coast Paving & Sealcoating, Inc. v. N. Allegheny Sch. Dist.*, 111 A.3d 220, 233 (Pa. Commw. Ct. 2015) The law does not require mathematical precision when calculating damages "The law simply requires the claim be supported by a reasonable basis for the calculation."
Rhode Island	*Banville v. Brennan*, 84 A.3d 424, 432 (R.I. 2014) While damages need not be proven "with mathematical exactitude," they should be "based on reasonable and probable estimates."
South Carolina	*Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 193 (S.C. Ct. App. 1995) [M]athematical precision is not required in the proof of loss

State	Case
South Dakota	*Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 153 (S.D. 1991) The amount of damages does not require proof to a degree of mathematical precision, and difficulty in computing the damages does not defeat one's right to prejudgment interest if it is susceptible of being made certain by mathematical calculation from known factors.
Tennessee	*Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 354 (Tenn. Ct. App. 2007) The primary goal of a compensatory damage award is to make the injured party whole[.]
Texas	*Phillips v. Carlton Energy Grp., LLC*, No. 12-0255, 2015 WL 2148951, at *9 (Tex. May 8, 2015) With respect to the recovery of lost profits as consequential damages, the law is well-settled: lost profits can be recovered only when the amount is proved with reasonable certainty. Proof need not be exact, but neither can it be speculative.

State	Case
Utah	*Austin v. Bingham*, 319 P.3d 738, 743-44 (Utah Ct. App. 2014) Proof of damages may therefore "be based upon approximations, if the approximations are based upon reasonable assumptions or projections." This is because once the fact of damages has been established, any uncertainty in the amount of damages must be borne by the wrongdoer.
Vermont	*Shahi v. Madden*, 949 A.2d 1022, 1031 (Vt. 2008) Difficulty in calculating damages with precision does not defeat a jury award .
Virginia	*Manchester Oaks Homeowners Ass'n, Inc. v. Batt*, 732 S.E.2d 690, 699 (Va. 2012)
Washington	*Clayton v. Wilson*, 227 P.3d 278, 285 (Wash. 2010) "Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture."

State	Case
West Virginia	*Checker Leasing, Inc. v. Sorbello*, 382 S.E.2d 36, 39 (W. Va. 1989) We have always held that damages need not be proved with precise exactitude.
Wisconsin	*Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 80 (Wis. 1996) [D]amages must be proven with reasonable certainty. However, this does not mean that a plaintiff must prove damages with mathematical precision; rather, evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation.
Wyoming	*Goforth v. Fifield*, 352 P.3d 242, 250 (Wyo. 2015) "In Wyoming, damages must be proven with a reasonable degree of certainty, but proof of exact damages is not required."

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRAs and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301.[1]

The case at bar, like another case scheduled for argument this Term, *Spokeo, Inc. v. Robins*, No. 13-1339 (in which TransUnion also filed an *amicus* brief), has important implications for class actions filed under the FCRA as well as under other laws that include statutory damages provisions. *Spokeo* asks this Court to examine whether a plaintiff lacking injury in fact has standing to pursue a class action. The case at bar presents an important corollary issue: What if the proposed class representative suffered injury in fact as a result of the alleged legal violation

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[1] Pursuant to Rule 37.3(a), petitioner and respondent filed blanket consents with the Clerk of the Court on June 12 and July 13, 2015, respectively. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

(and thus has standing), but other proposed class members did not? As a practical matter, the outcome of the case at bar is equally as important as *Spokeo* to define the proper scope of class action litigation in today's world of legal and economic complexity.[2]

TransUnion has a strong interest in ensuring that the FCRA and other laws are applied fairly. Indeed, TransUnion spends millions of dollars annually to ensure compliance with legal requirements. The opinion below has potential implications beyond Fair Labor Standards Act cases and threatens to greatly expand all class litigation beyond its appropriate compensatory role, thus simultaneously over-punishing defendants and diluting the recoveries obtainable by truly injured plaintiffs.

Any legal rule that permits liability to individuals who did not sustain injury in fact, fairly traceable to the alleged legal violation, will improperly expose TransUnion, other credit bureaus, data furnishers and users of credit reports to over-inflated theories of class liability, brought on behalf of persons who have no legitimate basis for recovery and who have no expectation of such recovery. The costs associated with defending against and often settling these cases will encourage more "bet the company" class litigation filed under novel liability theories. This will inevitably reduce innovation in new data services and diminish the scope of predictive information available to credit grantors to manage risk. Moreover, the expense of delivering information will be higher than it would be

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[2] Important questions related to Article III jurisprudence and a mechanism to prevent abuse of the class device likewise are presented this Term in *Campbell-Ewald Co. v. Gomez*, No. 14-857, in which TransUnion also has filed an *amicus* brief.

in the absence of potentially devastating litigation risk, and some services may become wholly unavailable due to the difficulty and expense of insuring against unpredictably massive statutory damages exposure. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

The Petition asks whether "differences among individual class members may be ignored and a class action certified where liability and damages will be determined with statistical techniques . " and "when the class contains hundreds of members who were not injured " TransUnion urges these questions to be answered in the negative. As explained by Petitioner here, the *Spokeo* petitioner, and as set forth in TransUnion's (and other *amici*'s) briefs filed in *Spokeo*, Article III imposes an injury in fact "hard floor" on standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

The Court of Appeals below (and before it, the District Court) erred by certifying a class on the theory that liability (*i.e.*, the *fact* of damage) could be determined through application of statistical methods. Where all class members are in fact injured it may be possible, in an appropriate case, to employ scientifically-sound statistical techniques that will reliably calculate the *amount* of damages each class member fairly deserves, but statistics alone cannot overcome the Article III hard floor of injury in fact. A statistical probability that a potential class member *might have been* injured does not justify including him or her within a class, because no person can partake in the recovery unless he or she has sustained actual

injury (or is at risk of "certainly impending" injury) that is "fairly traceable" to the legal violation. *See Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1143 (2013). A statistical probability that the plaintiff *might* have standing does not satisfy Article III requirements in an individual case, and because the Rules Enabling Act, 28 U.S.C. § 2072, does not purport to expand or contract standing requirements, Federal Rule of Civil Procedure 23 cannot confer standing upon class members based upon a mere statistical likelihood of injury. Nor can the need to determine the fair amount of recovery each class member deserves be overcome by statistical techniques that are no better than averaging or guesswork. A class should not be certified if, ultimately, a fair and appropriate remedy cannot be reasonably tailored for each proposed class member.

The errors below were compounded when the jury rendered what looks like an inherently defective quotient verdict. The only plausible explanation for the verdict is that the jury understood that many class members were not harmed at all. Yet the judgment will permit uninjured class members to share pro rata in the recovery, gaining a windfall, and the injured class members will release their claims as a matter of law, while only partaking of a diluted recovery. This outcome proves convincingly why class definitions must exclude uninjured parties. It also proves why analysis of injury in fact and causation must occur at the class certification stage, and why trial is too late to fix the problem of including uninjured parties in a class.

The prevailing weight of authority in the Courts of Appeals recognizes that uninjured persons may not be included in a litigation class. This Court should confirm the validity of these decisions. Some judges also have expressed concern about even allowing uninjured persons in settlement classes, and for good reason, because doing so will as a practical matter dilute the recoveries of truly injured persons. Thus, at the class certification stage, the class definition should be constructed in a manner that excludes uninjured persons, and if the number of truly injured persons is small or is not objectively ascertainable, no class should be certified at all.

Under the present state of the law, defendants have no choice, when negotiating settlements, to accede to dilutive plans of allocating settlement proceeds because many courts still permit uninjured parties to be included within litigation classes. Thus, a defendant cannot assure peace for itself unless it negotiates a class release encompassing all hypothetical claims by all hypothetical plaintiffs, whether or not they are actually injured.

This Court should reverse or vacate the decision below, and make it clear that uninjured persons should never be included in any class. Such a ruling would both reduce the risk of out-of-control class awards, and ultimately yield outcomes, whether by judgment or settlement, that are better targeted to deliver the appropriate amount of compensation to genuinely injured persons.

ARGUMENT

A. Injury in Fact Is an Element of Every Private Claim Filed in Federal Court.

Article III, section 2 of the Constitution limits the judicial power to "Cases" and "Controversies." Unless the plaintiff has suffered injury as a result of the defendant's alleged legal violation, and unless that injury is redressable by a judicial ruling, no case or controversy exists, and the plaintiff lacks standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Cognizable injury and a causal link between the injury and the alleged violation "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," and therefore "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561; *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("personal and tangible harm" must be proved). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497.

B. A Class May Include Only Those Persons With Injury in Fact Fairly Traceable to the Conduct Challenged in the Litigation.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997), this Court noted an argument that Article III precludes uninjured persons from being included in a class, but did not decide the issue definitively. *Amchem* ultimately concluded on other grounds that the class certification order being reviewed was improper. At the same time, this Court confirmed "that Rule 23's requirements must be interpreted in keeping with Article III constraints." *Id.* at 612-13. Now is the time for this Court to state definitively that

persons who did not sustain injury in fact, as a result of the conduct challenged in the litigation, may not be included within a class.

This Court's often-repeated rule that the proposed class representative must "possess the same interest and suffer the same injury as the class members" makes little sense if the class members themselves need not have suffered injury. *See E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (collecting cases) (internal quotation omitted); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.* ("*Rail Freight*"), 725 F.3d 244, 252 (D.C. Cir. 2013) ("The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy [W]e do expect the common evidence to show all class members suffered *some* injury.") (emphasis in original) (internal citation omitted); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing.") (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006));[3] *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (plaintiff must show that both he "and the class members were injured in the same fashion"); *Ways v. Imation Enterprises Corp.*,

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[3] Although *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), contains dicta to the effect that only the class representative's standing should be evaluated, in that case every "alleged class member was relieved of money in the transactions" as a result of the conduct challenged by the plaintiff, so the Ninth Circuit had no occasion to examine whether a wholly uninjured person could be included within a class. The Ninth Circuit's definitive statement in *Mazza*, that an uninjured person cannot be included, is the correct statement of the law.

589 S.E.2d 36, 46 (W. Va. 2003) (statistics alone "failed to show the existence of an aggrieved class").

Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." FED. R. CIV. P. 23(b)(3) advisory committee's note (1966); *see also Amchem*, 521 U.S. at 615 (goal is "systemic efficiency"). The purpose of a class action is to aggregate existing claims, so that they may be resolved more easily, but Rule 23 is misapplied when used to increase the value of claims, and it is abused when employed to create new claims that would not exist absent the class device. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (joinder and class action rules "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed") (plurality opinion) (Scalia, J.); *id.* at 448 n.7 ("if Rule 23 can be read to increase a plaintiff's recovery from $1,000,000 to some greater amount, the Rule has arguably enlarged a substantive right in violation of the Rules Enabling Act") (Ginsburg, J., dissenting) (internal quotation and alteration omitted); *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights The Rule imposes stringent requirements for certification that in practice exclude most claims."); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members"); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th

Cir. 1998) ("the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23").

Congress could not have intended and did not intend the Federal Rules of Civil Procedure to admit uninjured parties into a class, because the Rules Enabling Act says that procedural rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."); *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 462 (1974) ("Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accomodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."); *id.* at 462 n.9 ("Rule 23 was not intended to make a change in the substantive law."). Accordingly, Federal Rule of Civil Procedure 23 should be interpreted consistently with the injury in fact requirements of Article III. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem*, 521 U.S. at 613. When the modern form of the class action was introduced in the 1966 amendments to Rule 23, the primary objective was administrative efficiency in service of providing fair compensation to injured persons. The class device never was intended to become what it is today – a punitive device that as a byproduct delivers undeserved compensation to uninjured persons, while enriching the attorneys who confect broadly-defined but largely-unharmed classes.

Nor may a class representative with personal standing seek money for class members who themselves were uninjured and thus have no basis to receive compensation or any other form of monetary relief.

This Court often rejects theories of derivative standing. *See Clapper*, 133 S. Ct. at 1150 (rejecting standing theory based on government interception of communications of plaintiffs' foreign contacts because plaintiffs "can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired") (emphasis in original); *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990) (next friend of condemned prisoner may not challenge death penalty after prisoner has abandoned the challenge); *see also Mazus v. Dep't of Transp.*, 629 F.2d 870, 876 (3d Cir. 1980) (affirming denial of class certification in employment case where the "statistical evidence is ambiguous at best" as to whether members of the proposed class had in fact applied for and been rejected from the job category at issue).

Even where standing rules are loosened to permit review of a matter that might otherwise evade review, if "the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Article III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Claims for monetary relief do not qualify under any evading review exception to ordinary standing rules. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ___, 133 S. Ct. 1523, 1531 (2013). Standing to pursue a damages claim cannot be borrowed or lent; anyone who would receive monetary relief ordered by a federal court must have personal standing and legal grounds to receive money from the defendant, whether the relief is desired in an individual case or in a class case.

C. Statistics-Based Class Certification Theories Pose Special and Unfair Dangers to Participants in the Credit Reporting System.

The present record illustrates how statistics may be misused to create an impermissibly overbroad class. Once again, this Court should remind bench and bar that statistical methods must be subject to rigorous scrutiny at the class certification stage, and that improper use of statistical evidence of liability or damages risks an Article III violation.

This issue is of particular importance to TransUnion because of the nature of credit reports and how they are used by lenders, insurers, employers and landlords. It is rare for any single item on a credit report to be the dispositive factor in a decision to make a loan, write an insurance policy, offer a job or rent an apartment. However, TransUnion and others in the credit reporting system routinely face class action litigation based solely on hypothetical or speculative impact or technical violations that are truly meaningless to the outcome of a decision that was made in reliance on a consumer report.

To illustrate, the Federal Trade Commission (the "FTC") submitted a report to Congress in December 2012 regarding its national study of credit report accuracy. *See* FEDERAL TRADE COMM'N, REPORT TO CONG. UNDER SECTION 319 OF THE FAIR & ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (Dec. 2012). The FTC concluded that 26% of the participants in the study identified at least one potentially material error on at least one of their three credit reports (TransUnion, Equifax and Experian) and 13% of participants experienced a change in their credit score as a result of a modification after the dispute process. *Id.* at i.

The Policy & Economic Research Council ("PERC"), a private consulting group, also conducted a study on credit report accuracy, funded by the Consumer Data Industry Association, and published its findings in May 2011. *Id.* at 9-11. PERC found that 12.1% of the credit reports examined had possibly material errors and, after completion of the dispute process and rescoring of modified reports, only 3.1% of all reports examined experienced an increase in credit score of at least 1 point. *Id.* at 9-11. The differences between the FTC and PERC analyses confirm that similar studies can generate widely differing results, thus reaffirming the importance of district courts' rigorous scrutiny of any statistical analysis before applying it to certify a class or determine the composition of the class.[4]

Additionally, credit score changes, which plaintiffs often propose as a proxy for harm, do not translate point-for-point into the price or availability of credit, because all consumers within a particular risk "tier" tend to receive the same terms. For instance, all "prime" customers of a particular lender will receive the same terms for a particular loan offering, irrespective of the loan applicant's actual credit score. Terms differ only between applicants in different risk tiers. Thus, if a particular lender's "prime" cut-off is a score of 720, an applicant with a score of 722 will be offered terms that are identical to those offered to an

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[4] This Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), suggests that statistics-based theories should, at a minimum, satisfy the standard set forth in *Daubert v. Merell Dow Pharm., Inc.*, 509 U.S. 579 (1993). If District Courts continue to apply statistical methods at the class certification stage, without subjecting such methods to *Daubert* analysis, classes will continue to be based on less than precise science, rather than on the requisite basis of rigorous scrutiny.

applicant with a score of 772 (a fifty-point difference), but that are better than terms offered to an applicant with a score of 717 (a five-point difference). *See id.* at 43 ("There is no established rule or threshold for classifying the significance of a credit score change as minor or major because the impact of a change in score is dependent on the current score."). Credit reports usually contain multiple items and present a good overall picture of the consumer's risk profile. A single error on one item usually will not mar an overall accurate presentation of a good risk or have any impact whatsoever on the consumer's ability to obtain credit, or on the price at which credit is obtained, because the error will not be significant enough to push a consumer below his correct risk tier. For example, the PERC study found that "only one half of one percent of reports examined had credit scores that changed 'credit risk tiers' as a result of the dispute process." *Id.* at 11.

However, a class case that presumes damages to all consumers who have any credit report error or any credit score change whatsoever, based on overall population averages, will necessarily overcompensate the vast majority of consumers who suffered no practical impact from an error, and will necessarily undercompensate the extremely small number of consumers for whom an error may have had a material effect, because as explained above, even when an error appears on a report, actual impairment of the consumer's ability to obtain credit rarely occurs. To allow certification of a credit reporting class based simply upon the presence of an alleged error and the statistical possibility of impact deprives the defendant of potentially sound individualized defenses based on the report as a whole and the reasons why a particular decision was made. *See Thorn v. Jefferson-Pilot Life*

Ins. Co., 445 F.3d 311, 327-28 (4th Cir. 2006) (claim for equitable restitution, based on statistical proof, not suitable for class treatment due to individual differences within the proposed class); *Broussard*, 155 F.3d at 345 (reversing class certification order because the defendant was "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation"); *see also Bennett v. Nucor Corp.*, 656 F.3d 802, 818 (8th Cir. 2011) (disparate impact statistics had "little probative value" in an employment case where the applicants were otherwise unqualified for employment).

When the FCRA was enacted, the Chairman of the FTC told Congress that litigation would not be pursued based on errors that did not have a meaningful impact on a consumer's ability to obtain credit. *See Fair Credit Reporting Act – 1973: Hearings Before the Subcomm. on Consumer Credit of the Sen. Comm. on Banking, Housing & Urban Affairs on S. 2360 to Amend the Fair Credit Reporting Act* 649-50, 93d Cong., 1st Sess. (1973). In spite of that prediction made at the FCRA's dawn, class action attorneys now routinely file no-injury cases asserting only hypothetical harm based on tenuous statistics. And because of the unpredictability of litigation, these cases often must be settled on unfavorable and unfair terms due to the very real, very serious risk of "crushing liability." *See Trans Union LLC v. FTC*, 536 U.S. 915, 122 S. Ct. 2386, 2387 (2002).

D. This Court Should Once More Instruct the Lower Courts and Litigants About the Dangers Inherent in Statistical Methods.

For good reasons, which should be re-emphasized here, this Court rejected the use of statistical sampling as a means to certify a class in *Wal-Mart*, 131 S. Ct. at 2561.

> The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected [and] [t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project.

Id. (internal citations omitted).

This Court found in *Wal-Mart* that the respondents' attempt to show that all managers would act in the same manner "by means of statistical and anecdotal evidence" fell "well short" of the evidentiary standard. *Id.* at 2545. Similarly, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), warns that use of statistical models to certify classes risks violating defendants' rights. Read together, *Wal-Mart* and *Comcast* mean that, at the class certification stage, rigorous scrutiny of any statistical modeling proffered by the plaintiff is essential to determine that both liability and damages are capable of being determined for each particular class member via common proof, and with scientifically valid methods. *See Espenscheid v. DirectSat*

USA, LLC, 705 F.3d 770, 774 (7th Cir. 2013) (when decertifying class, district judge properly rejected unscientific sample proffered by plaintiffs).

In *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003), for example, the Fifth Circuit correctly ruled that class certification was improper where plaintiffs could not establish that their damages methodology (based on nationwide averages) represented "an adequate approximation of any single class member's damages, let alone a just and reasonable estimate of the damages of every class member." *See also Thorn*, 445 F.3d at 327-28. Liability to each proposed class member also cannot be assumed simply on the basis of statistical evidence. *See Cooper v. S. Co.*, 390 F.3d 695, 716-17 (11th Cir. 2004).

Similarly, in *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100 (2005), the Illinois Supreme Court reversed a billion-dollar class judgment in part because of specious damages theories. *Avery* involved a challenge to an automobile insurer's practice of encouraging repair shops to fix policyholders' vehicles with replacement parts made by suppliers other than the original vehicle manufacturers. In spite of no evidence that these parts failed as to each class member, and in spite of evidence that many class members were able to resell their vehicles, post-repair, at prices comparable to vehicles repaired with manufacturer parts, a massive class verdict was entered. The Illinois Supreme Court correctly recognized the inherent unfairness of the class trial and the plaintiffs' heavy dependence on questionable statistical proof. "Only if the part were actually installed, and only if it were shown that this part failed to restore the vehicle to its preloss

condition, could it possibly be said that the policyholder suffered damage." *Id.* at 148; *accord Cullen v. State Farm Mut. Auto. Ins. Co.*, 999 N.E.2d 614, 628-29 (Ohio 2013) (reversing class certification order based on claim that windshield repairs did not restore vehicles to pre-accident condition because the repair material was made from a different substance than the original windshield; many class members likely suffered no damage from use of the repair material instead of receiving a full windshield replacement). "[T]he claimant must establish an actual loss or measurable damages resulting from the breach in order to recover." *Avery*, 216 Ill. 2d at 149. If a class trial includes persons who were not harmed, the resulting judgment cannot be sustained. "A due process violation is clearly established where the method for determining damages has the potential to increase a defendant's aggregate liability by as much as $1 billion over what is warranted." *Id.* at 152.

If, at the time of class certification, the proponent of the class fails to proffer a method that will achieve a fair assessment of each proposed class member's *specific* actual damages, the class should not be certified in hopes that defects in the statistical model will be fixed later. *See Sosna*, 419 U.S. at 403 n.13 ("There are frequently cases in which it appears that the particular class a party seeks to represent does not have a sufficient homogeneity of interests to warrant certification."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (potential problems associated with trying classwide injury claims must be addressed at the class certification stage); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) ("We reject this approach of certify now and worry later.") (following *Amchem*, 521 U.S. at 623). Indeed, the record of the present case shows that an error introduced into the

case at the class certification stage will carry through to trial and lead to a patently indefensible result, as the jury's verdict cannot be applied sensibly to the class that went to trial here, based on the numerous differences within the class. The jury award here can only be explained as an attempt to deliver an average damages figure to a class that as a whole included numerous uninjured persons – an inherently arbitrary and unjust result. *Cf. McDonald v. Pless*, 238 U.S. 264, 267 (1915) (describing quotient verdict as inherently unfair); *see also Stein v. New York*, 346 U.S. 156, 178 (1953) (quotient verdicts are "forbidden," albeit difficult to prove with competent evidence); *United States v. 4,925 Acres of Land*, 143 F.2d 127, 128 (5th Cir. 1944) (reversing judgment rendered on quotient verdict).

Determining whether a proposed class is "sufficiently cohesive to warrant adjudication by representation" should occur at the class certification stage. *See Amchem*, 521 U.S. at 623. "If it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate." *Sw. Ref. Co.*, 22 S.W.3d at 436. By the time of trial it is too late, as a practical matter, to unwind problems with the class definition. *See Phillips v. Klassen*, 502 F.2d 362, 367-68 (D.C. Cir. 1974) (problems in formulating an appropriate classwide remedy should be considered at the class certification stage).

> If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh

> in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.

Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 31-32 (2014) (emphasis in original); *see also id.* at 55 ("a representative sampling approach to proving class liability is not appropriate for all statutory rights") (following this Court's opinion in *Wal-Mart*); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009) ("Serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts. The Rule requires a pragmatic assessment of the entire action and all the issues involved.") (internal citations omitted); FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability and defenses of liability, would be present, affecting the individuals in different ways.") (cited in *Ortiz*, 527 U.S. at 844 n.20). At a minimum, a trial court should rigorously scrutinize a prior certification order at the pretrial conference, and as the evidence unfolds during trial, and when necessary should decertify to prevent entry of an unfair class judgment.

In *Rail Freight*, the District of Columbia Circuit correctly applied *Wal-Mart* and *Comcast* to find that a

statistical analysis could not be employed to certify a class when the analysis simply showed probability of harm and was prone to "false positives," *i.e.*, necessarily included class members who were not harmed by the alleged antitrust conspiracy because the plaintiff's "methodology also detects injury where none could exist." *Rail Freight*, 725 F.3d at 252-53. The Fourth Circuit applies similar principles. *See Broussard*, 155 F.3d at 343 (rejecting class-wide damages theory based on average impacts: "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible.").

The First Circuit also said that no class can be certified in the first instance unless the proponent of the class presents an evidence-based "means of determining that each member of the class was in fact injured." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008). Indeed, "a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury." *Id.* at 25. This is particularly appropriate when certification of a broad class will raise the stakes of the litigation "so substantially that the defendant likely will feel irresistible pressure to settle." *Id.* at 26 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000)). Plaintiffs' class certification theory in *New Motor Vehicles* was based on statistics showing that the alleged antitrust violation purportedly caused an overall increase in the market price of vehicles, but the First Circuit rejected this basis for certification because "a minimal increase in national pricing would not necessarily mean that *all* consumers would pay more." *Id.* at 29 (emphasis in original); *see also Cooper*,

390 F.3d at 719 (rejecting argument for class certification based on statistical evidence); *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (class cannot be certified if it includes persons not harmed by the challenged practice); *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1349-50 (2009) (certification is improper where individualized issues predominate "pertaining to the *fact* of damage") (emphasis in original).

The First Circuit did say in *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015), that "the presence of a de minimis number of uninjured class members is permissible at class certification," but nonetheless recognized that uninjured persons must be excluded from any final judgment. As Judge Kayatta noted in dissent, "The majority correctly recognizes that certification of a class that includes uninjured consumers hinges on there being a method of identifying and removing those consumers prior to entry of judgment, and that any such method must be both administratively feasible and protective of the defendants' Seventh Amendment and due process rights." *Id.* at 33 (Kayatta, J., dissenting). Subsequently, after a several week trial, the *Nexium* jury delivered a verdict against the class. In its ruling denying the plaintiffs' motion for new trial, the District Court said that if the jury had found liability, plaintiffs would have been required "to prove the actual damages of individual class members," that aggregate proof of damages would have been rejected and that uninjured plaintiffs would not have been allowed any recovery. *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-2409 (D. Mass. July 30, 2015), ECF No. 1544 at 69; *see also Lemon v. Harlem Globetrotters Int'l, Inc.*, 437 F. Supp. 2d 1089, 1104 n.10 (D. Ariz. 2006) ("Even in class actions, proof of damages must be presented plaintiff-by-plaintiff, and

generalized, broad-brush damages arguments will not suffice.").

This Court should disavow authorities such as *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298, 308 (5th Cir. 2009), and *Neale v. Volvo Cars of North America, LLC*, __ F.3d ___, No. 14-1540, 2015 WL 4466919 at *5 (3d Cir. July 22, 2015), which say that at the class certification stage there is no need to take into account whether the class definition includes large numbers of uninjured persons. The Seventh Circuit takes the approach that a class may be certified if it includes uninjured persons, but not "a great many" of them. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). But a rule of "not a great many" gives insufficient guidance to lower courts, and as a practical matter opens the door to too many and too broad certification orders in a world where "Rule 23 is an empty vessel into which each judge pours his or her own philosophies, predilections, preferences, and prejudices." *See* Raoul Kennedy, *Belated Thanks for Something I Borrowed*, 28 CAL. LITIG., no. 2, 2015 at 41, 43 (quoting Moses Lasky). Moreover, *Kohen* is inconsistent with this Court's decision in *Comcast*. *See Rail Freight*, 725 F.3d at 255 (district court erred by relying on *Mims* and *Kohen*).[5]

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[5] *DG v. Devaughan*, 594 F.3d 1188, 1197 (10th Cir. 2010), said that "only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing by establishing they are suffering a continuing injury or are under an imminent threat of being injured in the future," but said this in regard to a Rule 23(b)(2) certification order in a case where no damages were sought at all. Thus, *DG* is not relevant to the present case, which involves whether uninjured persons may be included in a Rule 23(b)(3) damages class.

As discussed above, the Second, Fourth, Ninth and District of Columbia Circuits recognize that statistical methods may not be employed if doing so will result in including uninjured persons within a class. The supreme courts of California, Illinois, Ohio, Texas and West Virginia similarly warn against use of statistical methods too cavalierly to avoid rigorous proof of all the class certification elements. This Court should confirm the wisdom of these courts' approach, and should reject all efforts to certify classes that contain uninjured persons.

E. As a Practical Matter, the Court of Appeals' Analysis Hurts Injured Persons by Diluting Their Recoveries While Fully Releasing Their Legal Claims.

If the Court of Appeals' decision is allowed to stand, the practical consequence will be more settlements that over-punish defendants while undercompensating injured parties. As is presently the case, if defendants remain at risk of litigation from large classes that include uninjured parties, defendants will have no practical choice but to accede to settlements that compensate uninjured parties at the expense of injured parties.

This Court previously criticized dilutive settlements, but the opinion below, if allowed to stand, will enshrine such settlements into normal legal practice. In *Amchem*, for example, this Court criticized a settlement that diluted the claims of class members residing in states that permitted loss-of-consortium and medical-monitoring claims by treating those class members the same as class members residing in states that did not permit such claims. *Amchem*, 521 U.S. at 604. Similarly, in *Ortiz*, this Court expressed concern about a settlement structure that included, within the

same class, persons whose claims arose during a time period where insurance might cover the claims, as well as persons whose claims arose later and whose recovery might therefore be limited by the defendant's lack of insurance coverage. *Ortiz*, 527 U.S. at 857-58; *see also Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 442 (1997) (expressing concern that a legal rule permitting symptom-free persons to assert medical-monitoring claims "could threaten both a flood of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany unlimited and unpredictable liability") (internal quotations and citation omitted).

Given the litigation threat posed by no-injury class actions, TransUnion also must sometimes accept settlements that overcompensate uninjured parties. One example of such a case is *Wang v. Asset Acceptance, LLC*, No. 3:09-cv-04797-SI (N.D. Cal.), in which TransUnion also was a defendant. In *Wang*, a data furnisher inadvertently modified its credit reporting on disputed accounts to omit the account-in-dispute notation mandated by 15 U.S.C. § 1681s-2(a)(3). Lenders who later requested and received credit reports for consumers that contained an account with that furnisher were therefore not informed of the consumer's dispute with some aspect of the furnisher's reporting. Both the data furnisher and TransUnion were sued on the grounds that the error constituted a willful violation of the FCRA, per 15 U.S.C. § 1681n. Although the error occurred on more than 140,000 accounts, it had a potentially material impact on only approximately 8,000 consumers' credit scores. *See id.*, Mot. for Final Approval of Settlement (Mar. 30, 2012), ECF No. 160 ("*Wang* Approval Motion") at 2. Moreover, there was no proof that any of the

potentially affected consumers was ever actually denied credit as a result of the error. The case, however, only could be settled if relief was made available to all 140,000 potential class members, irrespective of either impact or potential impact, because under contemporaneous Ninth Circuit law, *see Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716-17 (9th Cir. 2010), lack of injury in fact is no basis to disqualify someone from membership in a class. *Wang* ultimately settled for creation of a cash settlement fund of $1,000,000 and the offering of non-cash consideration valued at $10,000,000 at the time of settlement approval. *Wang* Approval Motion at 2-3.

If the judgment below is affirmed, a wide range of businesses will face ever increasing litigation threats, that necessarily will be resolved in a manner that over-punishes defendants, while at the same time not fully compensating those sustaining actual injury.[6] Judge Jordan of the Third Circuit explained that the only way to prevent dilutive settlements, made for the sake of defendants' goal of "global peace," is to enforce standing requirements strictly, and to do so at the class certification stage. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 355-56 (3d Cir. 2011) (Jordan, J., dissenting). *Sullivan* involved approval of a class action settlement that all parties agreed included class members who probably had no valid claims. *Id.* at 340. Because of ongoing litigation risk, the defendant (correctly) insisted on settlement terms that would

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[6] As discussed in the briefing in *Campbell-Ewald*, TransUnion and many other businesses often are willing to provide full compensation to injured individual plaintiffs, but often are prevented from doing so because of class action attorneys' desire to create an enormous class of only hypothetically-injured people, with the ultimate goal of obtaining an inflated attorneys' fee settlement.

release all hypothetical claims, nationwide, and to support this release, all class members were entitled to partake in the settlement fund, even though the practical effect of this was to diminish the recovery of those class members with stronger claims. However, citing administrative difficulties in evaluating this issue in the context of a settlement, and also noting that a settlement involves the defendant's voluntary payment to potentially uninjured parties for the sake of achieving certain peace, the Third Circuit approved the settlement. *Id.* at 310-13 (majority opinion).

Dilutive settlements will be unavoidable so long as litigation classes that include uninjured persons are allowed to be certified. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) ("[S]ettlement . dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise. Such a settlement, however, is not likely to lead to a fund that can be distributed among the large number of class members who will assert claims and still compensate the strong plaintiffs for the value of their cases."); *In re Clearly Canadian Sec. Litig.*, 966 F. Supp. 930, 937 (declining to preliminarily approve class action settlement because of "the possibility that the class recovery will be further diluted by including purchasers without a genuine damages claim"), *vacated*, 29 F. Supp. 2d 612 (N.D. Cal. 1997); *id.* at 939-40 ("settlement which unjustly enriches some potential class members at the expense of those who actually suffered harm" or that has the effect of "shifting recovery to individuals who have no legitimate claim" should not be approved).

The better rule, which will protect injured parties and defendants both, is to exclude uninjured persons

at the class certification stage. And if it is not possible to ascertain, objectively, who has a potentially legitimate claim of injury and who does not, then the class should not be certified at all. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims."). "If we enforced substantive law as we ought to, those who actually have claims would not be required to share the proceeds of a proper settlement with those who do not." *Sullivan*, 667 F.3d at 353 (Jordan, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the judgment of the Court of Appeals, and further, this Court should explain that persons who did not sustain concrete injury in fact as a result of the conduct challenged in the litigation may not be included within a class.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF FOR THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The United Food and Commercial Workers International Union (UFCW) represents over 1.3 million members employed in a variety of industries, over 150,000 of whom are employed in the meatpacking and food processing industries affected by the donning and doffing and class and collective action issues at stake in this case. These members are typically low-wage workers employed in one of the nation's most dangerous industries. They rely on being paid for all hours worked to provide for their families, and they rely on the employer to properly record all hours worked. When they are not paid for all hours worked, they often rely on collective or class actions to recover their lost wages.

SUMMARY OF ARGUMENT

For decades, Tyson Foods has unlawfully failed to record the actual time worked by its production line employees for all activities preceding and following their time on the production line, including the donning and doffing of personal protective equipment. Instead of recording employees' complete and accurate time worked, Tyson Foods uses a pay code to compensate employees for an approximate amount of time spent on a portion of those activities. Tyson Foods' continued failure to record any of the actual

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

time spent on these tasks has made it increasingly difficult for employees to challenge the sufficiency of this proxy time payment. The business decision made by Tyson Foods to avoid creating and retaining records of time worked by its employees, as it is legally required to do, has left employees with no recourse but to develop alternative measures to more accurately approximate their full time worked. The time study at issue below is the most accurate and reliable measure against which Tyson Foods' proxy compensation system can be compared and evaluated.

ARGUMENT

Tyson Foods' failure to maintain records of time expended on compensable work—which created the need for the time study in dispute below—is hardly unique. Indeed, it is the latest episode in a decades-long pattern of similar conduct by Tyson Foods.[2] Although Tyson Foods made a modest change to its payment practices about seventeen years ago by adopting the "K Code" system—an approximate amount of time added to employees' pay for pre- and post-production line work—it made no concomitant change to its record-keeping practices. Several courts

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[2] Tyson Foods acquired IBP, Inc., another meat processing company, in 2001. At that time, IBP had been the subject of over a decade of litigation challenging its analogous compensation and record-keeping practices. After acquiring IBP, Tyson assumed responsibility for the liability IBP faced for violating wage and hour laws; courts have treated the companies interchangeably since then. *See, e.g., Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2013 WL 7045055, at *19-20 (D. Neb. Feb. 11, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015).

have since found that the K Code system does not fully compensate Tyson Foods' production line workers, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* *See* Section I.B below. Tyson Foods' failure to record the actual time worked by its employees both before and after their time on the production line has left no record by which to assess the adequacy of the compensation that the K Code provides. The litigation below, and the time study used by the Respondents to approximate the amount of time spent on pre- and post-shift donning and doffing activities, were prompted by the infirmities of the K Code system and by Tyson Foods' continued failure to record the time expended on these activities. The FLSA requires no less.

I. TYSON FOODS' CHALLENGED RECORD-KEEPING PRACTICES

The case below challenges Tyson Foods' failure to record the time worked by its production line workers in donning and doffing personal protective equipment before and after their shifts (and during their unpaid meal breaks) and correspondingly to compensate their workers for this work. Rather than record and pay for all this time, Tyson Foods uses a timekeeping system known as "gang time" or "mastercard time" to compensate its employees. This system limits compensation to the time spent on the processing line, excluding time preparing for and concluding work on the production lines and donning and doffing personal protective equipment. *See* Resp't's Br. at 7; *see also Acosta v. Tyson Foods, Inc.*, No. 8:08CV86, 2013 WL 7849473, at *19 (D. Neb. May 31, 2013) (presenting findings concerning the "gang time" system); *rev'd on other grounds*, --- F.3d ---, 2015 WL

5023643 (8th Cir. Aug, 26, 2015); *Garcia v. Tyson Foods, Inc.*, 766 F. Supp. 2d 1167, 1172 (D. Kan. 2011) (discussing the "gang time" system).

Despite repeated litigation that successfully challenged the "gang time" system, Tyson Foods continues to use this system to the exclusion of accurate and complete record-keeping. Rather than track the time employees spent donning and doffing protective gear and completing related activities, Tyson Foods elected to implement the "K Code" system. The K Code represents an approximate amount of time, initially four minutes and later increased by varying amounts, that is added to each employee's pay as a proxy to compensate for a portion of the actual time spent on pre- and post-production line work, including donning and doffing some personal protective equipment. *See, e.g., Acosta*, 2013 WL 7849473, at *19-20 (explaining the use of K Code time to compensate employees for donning and doffing); *Gomez*, 2013 WL 7045055, at *2 (same); *Garcia*, 766 F. Supp. 2d at 1172 (explaining K Codes and their history). By refusing to record the actual time worked on pre- and post-production line activities, Tyson Foods maintained no records by which to assess the sufficiency of the compensation provided by the K Code.

A. Tyson Foods Has a History of Failing to Record All Time Its Production Line Employees Have Worked, Despite Numerous Challenges and Court Decisions Rejecting These Practices

Litigation challenging the failure to maintain records of time employees worked—including the use

of "gang time" and the refusal to compensate for donning and doffing time—began more than 25 years ago. *See, e.g., Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 794 (M.D. Tenn. 2008) (explaining, in a similar case, that "[t]his case represents yet another chapter in a long history of litigations that span multiple fora, all of which involve the defendants here and the question of whether their compensation practices violate the Fair Labor Standards Act.")

In 1988, the Department of Labor sued IBP, Inc., a beef processing plant that was later acquired by Tyson Foods. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1318 (D. Kan. 1993). The court entered an injunction in 1996 directing that IBP "make, keep and preserve adequate records of its employees and of the wages, hours, and other conditions and practices of employment and to implement record-keeping practices sufficient to record the time spent by each employee in performing pre-shift and postshift activities found to be compensable under the Act." *See Acosta*, 2013 WL 7849473, at *9-11 (providing the text of the injunction); *Reich v. IBP, Inc.*, No. 88-2171-EEO, 1996 WL 445072, at *1 (D. Kan. July 30, 1996) (discussing and imposing the injunction), *aff'd sub nom. Metzler v. IBP, Inc.*, 127 F.3d 959, 965 (10th Cir. 1997) (internal citation omitted).

When Tyson Foods acquired IBP in 2001, it assumed responsibility for compliance with this injunction. *See Jordan v. IBP, Inc.*, No. 3:02-1132, 2004 WL 5621927, at *12 (M.D. Tenn. Oct. 12, 2004) (holding that the *Reich* injunction did not shield Tyson Foods from liability following this Court's later ruling in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)); *cf. Acosta*, 2013 WL 7849473, at *17 (discussing Tyson Foods' efforts

to avoid compliance with the injunction and courts' rejections of those efforts).

Ultimately, this injunction failed to induce IBP to "make adequate records" and "implement record-keeping practices sufficient to record the time spent by each employee in performing pre-shift and postshift activities." *See Acosta*, 2013 WL 7849473, at *9-11. The Department of Labor was forced to bring a second enforcement action, *Herman v. IBP, Inc.*, No. 98-cv-2163, Docket #1, slip op. (D. Kan. Apr. 10, 1998), which was quickly settled following the company's implementation of the K Code time system. *See Herman v. IBP, Inc.*, No. 98-cv-2163, Docket #26, slip op. (D. Kan. Jul. 16, 1999) (dismissing the case with prejudice); *see also Acosta*, 2013 WL 7849473, at *9-11 (discussing *Herman*).

In 2001, the Department of Labor issued an Opinion Letter to Tyson Foods that "reiterate[d] . . . the Department's longstanding position that . . . [a]n employer must compensate its employees for any activity that is an integral and indispensable part of the employee's principal activities, including the putting on, taking off and cleaning of personal protective equipment." T. Michael Kerr, Adm'r of the Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, Fair Labor Standards Act, 2001 WL 58864, at *1 (Jan. 15, 2001); *see also Acosta*, 2013 WL 7849473, at *10-11 (providing the same construction of the letter). The letter went on to reassert that "in order to comply with the FLSA and its implementing regulations . . . , a company must record and pay for each employee's *actual* hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear." DOL Opinion Ltr., 2001 WL 58864, at *2 (emphasis added).

However, Tyson Foods continued to rely on the K Code as a proxy for the compensable time worked, rather than begin recording all the time actually worked before and after its production lines were in operation. In doing so, Tyson Foods avoided creating any records by which the sufficiency of its K Code time could be assessed. *Cf. Acosta*, 2013 WL 7849473, at *11-12, *17 (discussing Tyson Foods' unsuccessful attempts to use the *Reich* injunction and early correspondence with the DOL to avoid liability under the DOL's 2001 Letter); *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1245-46 (D. Kan. 2007) (discussing Tyson Foods' efforts to avoid liability by using the *Reich* injunction to evade compliance with the Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)).

Tyson Foods' adoption and continued use of the K Code system has led to approximately a dozen lawsuits challenging its lawfulness.[3] In each of these

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[3] *See, e.g., Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300 (10th Cir. 2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Abadeer v. Tyson Foods, Inc.*, 975 F. Supp. 2d 890 (M.D. Tenn. 2013); *Gomez v. Tyson Foods, Inc.*, 976 F. Supp. 2d 1169 (D. Neb. 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015); *Acosta v. Tyson Foods, Inc.*, No. 8:08CV86, 2013 WL 7849473 (D. Neb. May 31, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023643 (8th Cir. Aug. 26, 2015); *Lopez v. Tyson Foods, Inc.*, No. 8:06CV459, 2008 WL 3485289 (D. Neb. Aug. 7, 2008); *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790 (M.D. Tenn. 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840 (E.D. Wash. May 16, 2005); *see also Guyton v. Tyson Foods, Inc.*, 767 F.3d 754 (8th Cir. 2014); *Robinson v. Tyson Foods, Inc.*, 254 F.R.D. 97 (S.D. Iowa 2008). Another twenty cases that also challenged the use of "gang time" and Tyson Foods' compensation and record-keeping practices were combined into a multi-district litigation. *See, e.g., In re Tyson Foods*, 694 F. Supp. 2d 1372 (M.D. Ga. 2010).

cases, as in the case at bar, plaintiff production line workers asserted that Tyson Foods' "mastercard," "gang time," and/or "K Code" systems were insufficient to capture all compensable time under federal and state laws. In nearly all of these cases, courts have found that Tyson Foods' K Code system and its corresponding failure to record all actual time worked by its employees failed to comply with the FLSA. *See, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003) (explaining that the K Code system "merely embodies an effort to overcome a settlement impasse"); *Acosta*, 2013 WL 7849473, at *6, *20 (holding that "Tyson cannot credibly contend that payment of K-code time amounted to record-keeping that satisfies DOL requirements," and that, by using K Code time, "Tyson has not compensated its employees for all of the work activities that have been found to be compensable in this and previous cases"); *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2013 WL 1090362, at *2 (D. Neb. Mar. 15, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015) (deciding all liability issues against Tyson Foods after rejecting the argument "that the company has kept proper and accurate records based on the fact that its time records include four minutes of time for donning and doffing," because such approximation was "not accurate"); *Lopez v. Tyson Foods, Inc.*, No. 8:06-459, Docket #235, slip op. at *4-5, *27 (D. Neb. Apr. 6, 2011) (concluding that "plaintiffs have worked hours that they have not been paid for" because Tyson Foods' employees are paid for "gang time" plus "K code time" and "Tyson does not keep track of the 'actual' time plaintiffs spend on such activities").

B. Tyson Foods' Litigation History Demonstrates a Troubling Pattern of Conduct

Repeatedly, Tyson Foods has been cautioned or ordered to record the actual time employees expend on activities before and after its production line is in operation. Tyson Foods has "now been litigating this same issue for decades, reflecting what can only be described as a deeply-entrenched resistance to changing their compensation practices to comply with the requirements of [the] FLSA."[4] *Jordan*, 542 F. Supp. 2d at 794; *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003); *Acosta*, 2013 WL 7849473, at *17, *22 ("since 2005, Tyson has performed great acts of legalistic legerdemain in its attempt to dodge the obliga-

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[4] Courts have also rejected Tyson Foods' argument that it is administratively impractical to record the time actually spent at work by its production line employees. *See Gomez*, 2013 WL 7045055, at *18 ("Tyson has not shown that it would be impossible or impractical to record and pay for the donning and doffing activities. It admits that it has a time-keeping system. This system could be modified to include the donning, doffing and sanitizing time."); *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2013 WL 5516277, at *6 (D. Neb. Oct. 2, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015) (rejecting Tyson Foods' administrative feasibility argument, explaining that "Tyson could easily have recorded and paid actual time by utilizing the time clocks it uses for attendance"); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1317-18 (N.D. Ala. 2008) (rejecting Tyson Foods' argument about its inability to move time clocks to better locations within the plant and concluding that the company could add new clocks to key areas of the plant and use its existing timekeeping system to track small amounts of time); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, slip op. at *52 (E.D. Wash. Dec. 9, 2004) (rejecting the argument that time in addition to the four minutes paid under the K Code system was either *de minimis* or nonexistent).

tions clearly imposed in *Alvarez*," but noting that it "could have avoided litigation by complying with DOL regulations and simply paying and recording actual time for donning and doffing").

Notwithstanding the admonitions of multiple courts, Tyson Foods has continued to refrain from recording the time expended before and after the production line operates. *See Abadeer*, 975 F. Supp. 2d at 912 (explaining that Tyson Foods has taken "a head-in-the-sand approach" to its record-keeping obligations whereby, "in the face of legal developments, Tyson neither altered its practices[,] questioned its conformity with the law," nor "genuinely sought to reconcile its continuing disagreement with the law."); *see also Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2001 WL 34897841, at *7 (E.D. Wash. Sept. 14, 2001); *Gomez*, 2013 WL 7045055, at *19-20 (discussing *Alvarez* and noting that the "undisputed evidence shows that IBP does not record or compensate employees for the work that has been found to be compensable to this day"); *Acosta*, 2013 WL 7849473, at *11-12 (discussing *Alvarez* and noting that "IBP never attempted to measure, record, or compensate for substantial amounts of pre-shift, meal-break and post-shift work"); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *5 (E.D. Wash. May 16, 2005) (explaining that Tyson Foods has "not altered [its] recordkeeping system").

Against this consistent backdrop, the findings below that Tyson Foods has again failed to record the time its production line workers actually expended at work are not surprising. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 799 (8th Cir. 2014) (recognizing, in the court below, that "Tyson has no

evidence of the specific time each class member spent donning, doffing, and walking" because it does not track or record this time).[5] Lacking records of the time actually worked during these periods, employees challenging the sufficiency of their compensation have been forced to rely upon expert-developed time studies to measure the actual amount of time worked by a sample of the affected workers.

II. TYSON FOODS' FAILURE TO KEEP RECORDS HAS CREATED THE NEED FOR WORKERS TO USE TIME STUDIES TO ENFORCE FEDERAL WAGE AND HOUR PROTECTIONS

A. Enforcement of the Fair Labor Standards Act Depends Heavily on Employers Maintaining Accurate and Complete Records of All Time Worked by Their Employees

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, requires that employers "keep proper re-

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[5] *See also Gomez*, 976 F. Supp. 2d at 1183 ("The defendant did not keep or maintain records as to the amount of actual time the employees spent on the compensable activities"); *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1286 (D. Kan. 2012) ("Tyson does not record the compensable time worked by its employees"); *Garcia*, 770 F.3d at 1307 ("Tyson failed to record the time actually spent by its employees on pre- and post-shift activities"); *cf. Abadeer v. Tyson Foods, Inc.*, No. 3:09-cv-00125, 2014 WL 1709289, at *4 (M.D. Tenn. Apr. 3, 2014) (explaining that Tyson Foods tracked time from clocking in to starting work on the production line, but did not record or pay for time from donning frocks through clocking in prior to processing work).

cords of wages, hours and other conditions and practices of employment" to ensure that its mandate is achieved. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). The FLSA places on employers the responsibility for maintaining such accurate and complete records of time worked, because they are in the best "position to know and to produce the most probative facts concerning the nature and amount of work performed." *Id.* at 687.

Where an employer has failed to keep records of all time worked, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of the [FLSA]." *Id.* at 688. Any other conclusion would "place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation." *Id.* at 687; *see also id.* at 688 ("the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances"); *Abadeer v. Tyson Foods, Inc.*, No. 3:09-cv-00125, 2014 WL 1709289, at *2-3 (M.D. Tenn. Apr. 3, 2014) (same).

Although accurate and complete records of time actually worked constitute the best way of ensuring compliance with the FLSA, alternative means of estimating time worked must be available when employers fail to record all of this time, in order to ensure the protections provided by the FLSA are achieved.

B. Tyson Foods' Failure to Record All Time Worked Created the Need for Respondents' Time Study

The FLSA places the initial burden on workers to demonstrate that they performed work for which they claim not to have been compensated, as well as the amount and extent of such work "as a matter of just and reasonable inference." *See Mt. Clemens*, 328 U.S. at 687-88. Where the time worked has not been recorded by the employer, workers claiming they were not fully compensated have employed methods such as the time study below for estimating the time they actually worked. *See, e.g., Garcia*, 890 F. Supp. 2d, at 1284-85 (discussing the use of a time study); *Gomez*, 2013 WL 5516277, at *6 ("Tyson miscomprehends the essential fact that the plaintiffs are unable to establish damages on an individualized, job-by-job, day-by-day, basis because it elected not to keep records of actual time," and that such proof "is not possible as a result of Tyson's own actions"). For a further discussion of time studies, *see* Resp't's Br. at 16-17.

Numerous courts have concluded that time studies are a necessary and reliable means of estimating the amount of time actually worked "by a just and reasonable inference."[6] *See Gomez*, 976 F. Supp. 2d

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[6] In fact, Tyson Foods itself has used similar time studies to support its own policies and positions. *See, e.g., Acosta*, 2013 WL 7849473, at *5-6 (explaining that Tyson Foods' "arguments with respect to [Plaintiffs' expert] testimony are considerably weakened by the fact that its own time study used similar methodology"); *Garcia*, 890 F. Supp. 2d at 1289-90 (discussing

at 1182 (noting that the jury was permitted to and did credit the time study, at least in part); *Garcia*, 890 F. Supp. 2d at 1285 (accepting the time study to bolster the plaintiffs' damages claim); *cf. Garcia v. Tyson Foods, Inc.*, 770 F.3d at 1307 (holding that "the jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities").

"In light of the fact that Tyson failed to keep records of actual time as required under [the] FLSA, [expert] time study and testimony provide an acceptable means of determining what those time records would have shown if Tyson had complied with its statutory obligations." *Acosta*, 2013 WL 7849473, at *6, *20-22. In the present case, the dearth of records from which to determine the adequacy of the compensation provided by the K Code system mandates the development of another measure against which the system can be compared. Time studies present the most reliable basis to make this comparison when employers fail to maintain contemporaneous records of all time worked.

Tyson Foods' use of time studies); *Garcia*, 766 F. Supp. 2d at 1173 (same).

CONCLUSION

For the reasons set forth above, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Industrial Polymers, Inc., Quabaug Corporation, and Seegott Holdings, Inc., are businesses that, *inter alia*, purchase urethane products that a jury found were the subject of a massive price-fixing cartel. *Amici* are the named plaintiffs in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. pending*, No. 14-1091 (filed Mar. 9, 2015). That case involved a years-long, executive-level conspiracy in which several horizontal competitors conspired to fix prices on billions of dollars of commerce in commodity urethane chemicals. The *Urethanes* case involved a textbook use of Rule 23: the plaintiffs offered extensive common evidence showing that the defendants conspired to fix prices, that their malfeasance had class-wide impact, and that the plaintiffs were entitled to damages.

This Court's decision in the instant case should have no effect whatsoever on the use of Rule 23 in the *Urethanes* case, which involves legal claims, record evidence, and expert testimony that are entirely different from the Fair Labor Standards Act (FLSA) wage-and-hour claims currently before the Court.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, represents the Respondents in this case and the Respondents in *Dow Chemical Co. v. Industrial Polymers*, No. 14-1091 (who are *amici* here). The Kellogg Huber attorneys representing the Respondents in this case had no involvement in the preparation of this brief. The parties have consented to the filing of this brief.

Thus, but for the decision of Dow Chemical Company, the defendant in *Urethanes*, to file an *amicus* brief presenting a highly skewed version of the facts in the *Urethanes* case, *amici* would have no interest in the *Tyson* case. *Amici* submit this brief for the limited purpose of responding to Dow's filing. As explained below, the *Urethanes* case involved a textbook use of Rule 23 that can and should be upheld regardless of how the Court resolves the discrete and different issues in the instant case.

SUMMARY OF ARGUMENT

This Court has described executive-level price-fixing conspiracies as "the supreme evil of antitrust." *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). The *Urethanes* case involved a years-long conspiracy to fix the prices of billions of dollars of commerce in urethane chemicals, featuring everything from secret off-shore meetings to clandestine calls from gas station pay phones.

After a four-week trial and a vast evidentiary showing—including extensive common evidence of the conspiracy and its class-wide impact—the jury found that Dow and its competitors engaged in an unlawful cartel that resulted in a class of corporate purchasers paying higher prices for urethane chemicals than they would have paid but-for the conspiracy. The actual trial confirmed that common issues and common evidence overwhelmingly predominated over any individual issues, and that the class action was eminently manageable.

Every federal judge involved in the *Urethanes* case has rejected Dow's efforts to upset the jury verdict and damage award. With the benefit of the exhaustive

trial record and its experience overseeing eight years of hard-fought litigation, the District Court rejected Dow's untimely attempt to decertify the class and its post-trial challenges to the verdict and damage award. The Tenth Circuit unanimously affirmed, holding that whether the conspiracy impacted urethane prices was "a common question that was capable of class-wide proof." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014). Dow subsequently sought panel and *en banc* rehearing, but not a single judge voted to grant the petition.

In its *amicus* brief here, Dow regurgitates the same arguments it raises in its pending certiorari petition, but those contentions fare no better here (and are misplaced in this plainly distinguishable context). For example, Dow contends that class certification in *Urethanes* was based on "presumptions" and "shortcuts," and that individualized issues predominated over class-wide issues. To the contrary, the District Court and Tenth Circuit allowed the *Urethanes* case to proceed as a class action based on a rigorous analysis of the extensive *evidence* of Dow's misdeeds and their systematic impact on the class, including evidence of class-wide impact from Dow's *own* witnesses and documents. Dow also attacks the damage award as an impermissible "trial by formula," but simply attaching a label to a routine use of time-tested statistical techniques is not enough to create a *Wal-Mart* issue. The plaintiffs' expert analysis was grounded in well-established statistical techniques that have been routinely (and unobjectionably) used in antitrust cases for years by both plaintiffs and defendants.

At bottom, Dow's unusual *amicus* brief is a thinly-veiled attempt to lay the foundation for a remand if the Petitioner prevails in the instant case. But the FLSA wage-and-hour claims currently before the Court are vastly different in terms of both law and fact from the horizontal price-fixing claims at issue in *Urethanes*. Moreover, Dow made a number of strategic gambits in the *Urethanes* case that it should not be permitted to recant now that it has taken its case to the jury and lost. The *Urethanes* verdict should be upheld in all respects regardless of how this Court decides the instant case.

ARGUMENT

I. The *Urethanes* Case Involved A Textbook Use Of Rule 23 To Address "The Supreme Evil Of Antitrust Law"—A Horizontal Price-Fixing Conspiracy.

In the *Urethanes* case, Dow and four of its ostensible competitors engaged in a years-long, executive-level conspiracy to control the prices of billions of dollars of commerce in commodity "urethane" chemicals. The evidence of collusion—and industry-wide impact—was overwhelming. One Dow executive flatly stated that "there was an agreement" to fix prices. SA1274.[2] And a mountain of documentary, testimonial, and expert evidence established that the cartel worked exactly as intended, inflating urethane chemical prices across the board.

Dow played a central role in the conspiracy. For example, one Dow executive participated in "8 to 15"

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[2] The SA and AA citations in this brief refer to the Appendix filed in the Tenth Circuit in the *Urethanes* case.

price-fixing discussions with his urethanes counterpart at Bayer, including episodes in which the Bayer executive left his office to return a call from a gas station pay phone and had his office swept for "bugs" to avoid detection. SA881-82, 905-08, 921, 997. The cartel held secret price-fixing discussions in airports, hotels, golf resorts, coffee shops, in side meetings at trade association events, in walks outside to avoid "listening devices," on home and cellular phones, and at a restaurant in Belgium (for which the expense report was falsified to conceal the identity of the participants). SA15, 29-30, 867-893, 1995-98. Needless to say, all of this evidence was not only devastating, but the very paradigm of common evidence on a common issue that would recur in every purchaser's antitrust action against Dow and its co-conspirators.

The *Urethanes* plaintiffs brought suit more than a decade ago on behalf of a class of purchasers, alleging that Dow and its co-conspirators engaged in an illegal price-fixing cartel between January 1999 and December 2004. Like the vast majority of price-fixing cartels in commoditized markets, this cartel was ideally suited for class treatment under Rule 23. After nearly four years of pre-certification discovery, the District Court "carefully and thoroughly reviewed the class certification record" and granted the plaintiffs' motion for certification. *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 637 (D. Kan. 2008). The court "perform[ed] a rigorous analysis" and required the plaintiffs to satisfy a "strict burden of proof" to establish that the requirements of Rule 23 had been met. *Id.* at 631. Considering the class certification record as a whole, the court found that common issues

regarding both the existence of a conspiracy and price impact predominated over individualized issues.

A four-week trial followed that featured common evidence introduced by not only the plaintiffs but also Dow. After carefully weighing all of this evidence, and receiving proper instructions about the governing law, the jury returned a class-wide verdict in favor of the plaintiffs. The jury found that: (1) Dow participated in a conspiracy to fix, raise, or stabilize prices for urethane chemicals; (2) the conspiracy caused the plaintiffs to pay more for urethane chemicals than they would have paid absent the conspiracy; and (3) class-wide damages totaled $400,049,039.

The Tenth Circuit unanimously affirmed, holding that the District Court did not abuse its discretion by certifying the class and upholding the damage award. *See Urethane*, 768 F.3d at 1253-59. The court concluded that whether the conspiracy impacted prices was "a common question that was capable of class-wide proof." *Id.* at 1254-55. Indeed, the Tenth Circuit noted that "Dow has not identified a single class member for whom injury was impossible." *Id.* at 1267. And the jury could have inferred from the evidence "that a conspiracy existed and ... caused prices to be higher than they would have been in a marketplace free of collusion." *Id.* at 1255, 1266 & nn.21-22.

The Tenth Circuit also rejected Dow's attempt to analogize this case to the impermissible "trial by formula" in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, individualized proceedings were necessary because the common questions—the reasons for the pay and promotion disparities—could

not yield a common answer "in one stroke." *Id.* at 2551-52. In *Urethanes*, by contrast, "there were two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact." 768 F.3d at 1256. Finally, the Tenth Circuit also rejected Dow's criticisms of the damages award, holding that the plaintiffs' use of the well-established statistical technique of extrapolation—which was based on a multiple regression analysis of more than one million *actual* urethanes transactions—reliably estimated damages for transactions that could not be modeled directly. *See id.* at 1256-57; *see also In re Urethane Antitrust Litig.*, 2013 WL 2097346, *3 (D. Kan. May 15, 2013).

Dow subsequently filed a petition for panel rehearing or rehearing *en banc*, which the Tenth Circuit denied on November 7, 2014. Not a single judge voted to grant rehearing.

II. Dow's Challenges To The *Urethanes* Jury Verdict Are Wholly Without Merit.

Dow attempts to use its *amicus* brief in this case to obtain a second bite at the apple in challenging the jury's verdict in the *Urethanes* case. Those arguments fare no better here than they do in the appropriate forum in which to raise such issues (Dow's pending certiorari petition).

A. Dow does not dispute that it engaged in a years-long horizontal price-fixing conspiracy. It could not, as the jury's finding of a conspiracy based on overwhelming and overwhelmingly common evidence is unimpeachable. Instead, Dow contends (at 2-3, 10-11) that the *Urethanes* case never should have been certified for class treatment because "many

purchasers were not injured at all" and the lower courts used "illegitimate shortcuts and approximations that papered over enormous variations among class members." As every judge to review the record in the *Urethanes* case has concluded, those arguments fail.

The *Urethanes* judgment did not turn on any "shortcuts" or "presumptions," but on extensive *evidence* showing that the unlawful conspiracy had a class-wide impact on prices. That evidence was overwhelming. The plaintiffs presented common proof showing that cartel members issued a series of industry-wide lockstep price increase announcements coordinated by top executives with nationwide pricing authority. *See Urethane*, 768 F.3d at 1254-56, 1266 & nn.21-22; *Urethane*, 2013 WL 2097346, at *3, 6; *see also In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 67-68 (2d Cir. 2012) (class-wide impact supported by coordinated lockstep price increases).

Indeed, even Dow's own documents and witnesses recognized that the collusive price increases were successful. One Dow witness admitted that the collusive announcements served as the starting point for *all* customer negotiations and that, post-negotiation, customers routinely accepted the full price increases and partially accepted many others. SA1273-74, 3886, 4156; *see In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (the higher the list price, "the higher the ultimately bargained price is likely to be"). Internal documents from the conspirators also described the price-increase announcements as "successful," SA303, and "solid," AA1639. Cartel members boasted that

they "got the full increases" and that "the price increases [are] becoming effective and being paid." SA300, 342. Another Dow document gleefully announced that the price increases were "**Working!!!!!!!.**" 768 F.3d at 1266 n.22 (emphasis and exclamation points in the original).

Expert testimony also provided common evidence of class-wide impact. One plaintiffs' expert (whose testimony Dow did not challenge on appeal) testified that the structural features of the urethane industry—a concentrated market of homogenous products with high barriers to entry and no close product substitutes—made the industry highly conducive to class-wide price effects, and that nearly all class members had been impacted. *Id.* at 1258-59, 1265; *Urethane*, 2013 WL 2097346, at *7. And another expert offered a multiple-regression analysis of more than one million *actual* urethane transactions—comparing actual post-negotiation prices to prices that would have prevailed in a competitive market—that showed systematic overcharges throughout the conspiracy period, across all urethane products, all geographic regions, and for large and small customers alike. 768 F.3d at 1256, 1260-63. Even Dow's expert economist conceded that actual price increases routinely followed the lockstep announcements. SA5258.

For the same reasons, Dow is flatly wrong to suggest (at 10) that the prices customers paid "were often unaffected by the price announcements." As the Tenth Circuit correctly recognized, Dow has failed to identify any *actual* class members that were not impacted in some way by the cartel. *See* 768 F.3d at

1267. The record showed that the cartel's coordinated pricing either affirmatively increased prices or, at a minimum, *maintained* prices that otherwise would have fallen in a competitive market. The existence of some negotiations by individual purchasers (which would have proceeded from a different baseline) hardly disproves class-wide impact in a case where prices would have fallen sharply absent the cartel's illegal actions. *Id.* at 1254 n.6.

It is also revisionist history for Dow to assert (at 10-11) that "the constraints of class discovery and trial" prevented it from offering individualized evidence showing that certain purchasers were unaffected by the collusive price announcements. Dow had *eight years* of discovery to obtain evidence of "individualized" negotiations. And nothing stopped Dow from offering at trial evidence of customers who purportedly resisted the cartel's efforts to increase prices. Indeed, Dow presented such evidence in an effort to secure a class-wide defense verdict, *see* SA5891, 5894, but the jury simply was not persuaded. Having tried its case to the jury and lost on the merits, Dow cannot now complain that it was not given a full and fair opportunity to respond to Respondents' evidence of class-wide impact.

B. Dow is also wrong to suggest (at 16) that the *Urethanes* plaintiffs' expert impermissibly used a "formulaic extrapolation" that "buried individual injury and damages questions that would have predominated over common questions."

Plaintiffs' expert (Dr. James McClave) analyzed all the transaction data the defendants produced in discovery—a massive data set of approximately one

million representative urethane transactions. Using a multiple regression analysis, a common statistical tool in price-fixing cases, McClave confirmed that *post-negotiation* prices vastly exceeded competitive levels. *See* 768 F.3d at 1266 n.22. Controlling for industry variables such as raw material cost, capacity, and demand, the regression showed systematic price inflation that was attributable to the cartel across all urethane product categories, defendants, geographic areas, time periods, and for large and small customers alike. SA3474, 3502-03, 3520-23. The models showed that more than 98% of modeled customers were injured and paid overcharges at some point in the class period. AA2441, 2445.

To quantify class-wide damages, McClave used the multiple regression results and applied those estimated overcharges to each class member's purchase data. For approximately one million transactions—50% of the purchase volume—McClave estimated the overcharge directly through multiple regression analysis. For the remaining transactions for which data were incomplete or unavailable, McClave extrapolated damages based on the results of his multiple regression analysis.

Dow's argument that McClave's "aggregate damages calculations"—"well established in federal court and implied by the very existence of the class action mechanism itself"—"violated Rule 23 or [its] due process rights ... fails in the starting gate." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009). Indeed, *Dow's own expert* did not dispute that extrapolation may be used in precisely such scenarios where "there's not enough

data points to do an analysis" for certain individual plaintiffs' damages. SA5552-54.

To the extent Dow is concerned about "the merits" of McClave's conclusions and analysis, those concerns "should normally be left to the jury." *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 808 (7th Cir. 2013). The jury's class-wide determination of damages based on the evidence offered at trial is a paradigmatic factual finding entitled to exceptional deference on appeal. *See, e.g., Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination[.]").

III. The Court's Resolution Of The Instant Case Should Not Affect The Use Of Class Actions Or Well-Established Statistical Tools In Price-Fixing Cases.

In addition to rearguing the facts of its own pending certiorari petition, Dow attempts to lump its petition together with this case, asserting (at 1) that the issues presented here "overlap" with those in the *Urethanes* case. But both the law and the facts of the *Urethanes* case are far afield from the issues in this case, and the outcome of *Urethanes* should not be dictated by the Court's resolution of the unique issues presented in *Tyson*.

First, the antitrust price-fixing claims in *Urethanes* are very different from the FLSA wage-and-hour claims at issue here. This Court has described horizontal price fixing as "the supreme evil of antitrust." *Trinko*, 540 U.S. at 408. And, even more to the point, this Court has recognized that antitrust cases are uniquely well-suited to class-wide resolution

under Rule 23, noting that "[p]redominance is a test readily met in certain cases alleging violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Any holding regarding class certification in the distinct context of FLSA wage-and-hour claims should not cast doubt on the well-established use of Rule 23 by those injured by unlawful price-fixing cartels.

Second, the record evidence in the *Urethanes* case is very different from the types of evidence that Petitioner challenges here. Petitioner takes issue with a "time study" by an industrial engineer that measured the average length of time that certain tasks took for workers in a pork-processing plant. That is far afield from the expert evidence in the *Urethanes* case, which involved a multiple regression analysis of more than one million actual urethanes transactions that controlled for numerous other variables. The regression confirmed beyond doubt that Dow's price-fixing resulted in systematic price inflation that was attributable to the cartel. Both plaintiffs and defendants in antitrust cases routinely use multiple regression analysis to prove price impact and damages (or lack thereof). *See, e.g.*, Rubinfeld, *Reference Guide on Multiple Regression* 348 n.90, in Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed. 2012) (discussing use of multiple regression in price-fixing cases). Whatever this Court decides about whether the *Tyson* plaintiffs' time-study evidence is sufficient to establish class-wide damages should have absolutely no effect on the well-established use of multiple regression analysis in antitrust cases.

Third, many of the issues that Dow raises in its certiorari petition (and *amicus* brief) were waived below and would thus provide no basis for vacating the jury verdict regardless of how the Court decides this case. For example, Dow filed its motion to decertify the *Urethanes* class literally on the eve of trial, and the District Court held that this was an independently sufficient basis to deny the motion. *See Urethane*, 2013 WL 2097346, at *1. As to damages, Dow did not so much as mention "extrapolation" as an issue in any of its pre-trial *Daubert* filings. Dow also declined the District Court's invitation to move to bifurcate the damages portion of the trial, instead requesting "a single finding on class-wide damages." *Urethane*, 768 F.3d at 1259 n.11. Dow's subsequent regret in the face of an adverse class-wide verdict may be understandable, but Dow is not entitled to a mulligan to remedy its own tactical decisions and deliberate waiver of the opportunity to address damages on an individualized basis.

CONCLUSION

The *Urethanes* case involved a textbook use of Rule 23 to provide a remedy for companies that were injured by horizontal price fixing, "the supreme evil of antitrust." *Trinko*, 540 U.S. at 408. The legal and factual issues raised in the *Urethanes* case are entirely distinct from those implicated by the instant case. This Court should reject Dow's attempt to tie itself to an inapposite wage-and-hour case in order to absolve itself of liability for its years of illegal price fixing.

Respectfully submitted,

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Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF WAL-MART STORES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF WAL-MART STORES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Wal-Mart Stores, Inc.—the world's largest retailer—operates over 11,000 stores across 27 countries, and serves nearly 260 million customers each week in its stores and online. In the United States alone, Wal-Mart employs more than 1.3 million associates, making it the nation's largest private employer. Given the size and scope of its operations, Wal-Mart is frequently the target of class-action lawsuits in both federal and state courts, and has been subjected to some of the same unfair and unconstitutional practices that Tyson Foods is challenging in this case.

As Wal-Mart has experienced first-hand, lower courts all too frequently allow class-action plaintiffs to rely on shortcuts like extrapolation and averaging to force highly individualized claims into the class-action framework. For example, in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court unanimously reversed the en banc Ninth Circuit's endorsement of "Trial by Formula"—a proposal to

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adjudicate a class action by extrapolating classwide outcomes from a sample of class members' claims. The Court rejected that novel procedure because it would have eliminated Wal-Mart's right "to litigate its statutory defenses to individual claims" and would therefore have violated the Rules Enabling Act's prohibition on "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Id.* at 2561 (quoting 28 U.S.C. § 2072(b)).

More recently, in *Braun* v. *Wal-Mart Stores, Inc.*, the Pennsylvania state courts upheld a judgment of more than $150 million in a wage-and-hour class action against Wal-Mart where the plaintiffs secured class certification and a classwide judgment by relying on experts who extrapolated from evidence relating to a subset of class members and a portion of the class period to reach conclusions with respect to all class members over the entire period. *See Braun* v. *Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014); *Braun* v. *Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011). As a result of these shortcuts, the plaintiffs were relieved of their burden to prove the elements of their individual claims, and did not have to confront Wal-Mart's individualized defenses.

Yet, when Wal-Mart challenged this patently unfair procedure on due process grounds, the Pennsylvania Superior Court held that the "contention that Wal-Mart was denied due process" was "in derogation of class certification." *Braun*, 24 A.3d at 951. The Pennsylvania Supreme Court also affirmed the judgment, and like the Eighth Circuit in this case, held that this Court's rejection of "Trial by Formula" in *Dukes* did not bar the trial court's

extrapolation-based procedure. *See Braun*, 106 A.3d at 665; *see also* Pet. App. 10a–11a. Wal-Mart's petitions for certiorari to the Pennsylvania Supreme Court and the Pennsylvania Superior Court in *Braun* remain pending. *See* Nos. 14-1123, -1124 (filed Mar. 13, 2015).

Wal-Mart submits this *amicus* brief to emphasize the serious due process implications for both defendants and absent class members when "Trial by Formula" and similar "rough justice" approaches are deployed to adjudicate class actions involving highly individualized claims that are not amenable to classwide treatment. As Wal-Mart's experience illustrates, this is a critical and recurring issue—particularly in state courts, where the constraints of the Rules Enabling Act and Federal Rule of Civil Procedure 23 do not apply. This Court's explicit guidance on this constitutional question is urgently needed to make clear that the longstanding procedural requirements of the common-law tradition cannot be abandoned in order to squeeze ill-fitting claims into the class-action mold.

SUMMARY OF ARGUMENT

The Constitution protects against the erroneous deprivation of property by guaranteeing basic due process rights in legal proceedings. These fundamental procedural protections—including the rights to be heard, to present all available defenses, and to cross-examine adverse witnesses—are deeply embedded in the common law and apply with equal force to individualized adjudications and class-action proceedings. *See, e.g., Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980).

Yet, with the "adventuresome" expansion of the class-action device in the modern era, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997), these essential due process protections are all-too-often jettisoned by courts eager to facilitate classwide adjudication of inherently individualized claims. In their place, these courts substitute procedural shortcuts—such as extrapolation, sampling, and averaging—that can prejudice defendants and absent class members alike.

Over four years ago, this Court in *Dukes* firmly rejected an extrapolation-based approach to class-action litigation that would have relieved class members of the obligation to prove the elements of their individual claims and denied Wal-Mart the right to raise individualized defenses to those claims. *See Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011). Despite this Court's unambiguous "disapprov[al]" of the "novel project" of "Trial by Formula," *id.*, that flawed approach persists and continues to be invoked with disturbing frequency by state and federal courts searching for procedures that will enable the resolution of highly individualized claims in the class-action setting.

In this case, for example, the Eighth Circuit upheld class certification and a classwide judgment even though donning-and-doffing times varied dramatically across individual class members due to differences in the types of protective gear worn and washing performed (from zero minutes by all non-knife-users to multiple and varying minutes by knife users) and even though there were differences in how class members were paid for these tasks. Pet. 9. To

overcome these individual variations and facilitate classwide treatment, the lower courts permitted plaintiffs to rely on an average donning-and-doffing time, calculated based on a nonrepresentative sample of the class, to establish liability and damages for *all* class members—without any individualized determinations by the jury as to whether a particular class member had actually been undercompensated and, if so, the amount of that undercompensation. *Id.* at 9–10. As a result of this combination of extrapolation, sampling, and averaging, class members were not required to prove the elements of their individual claims, Tyson Foods was deprived of its right to raise individualized defenses to those claims, and absent class members were forced to accept an average award of damages that disregarded their individual times and payments.

That the Eighth Circuit sanctioned such a radical departure from traditional common-law procedures in the wake of this Court's decision in *Dukes* is confounding and plainly irreconcilable with Federal Rule of Civil Procedure 23 and the Rules Enabling Act. But the Eighth Circuit is by no means alone in this respect, as Wal-Mart's experience in *Braun* demonstrates. *See Braun* v. *Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014). To extinguish these problematic practices nationwide—in both state and federal courts—this Court should hold expressly that the use of extrapolation, sampling, and averaging to relieve individual class members of their burdens of proof and to foreclose the litigation of individualized defenses is incompatible with due process.

ARGUMENT

I. CLASS ACTIONS CANNOT BE USED TO ELIMINATE THE FUNDAMENTAL PROTECTIONS OF DUE PROCESS.

Settled common-law tradition and this Court's due process jurisprudence establish that defendants can only be deprived of their property where plaintiffs prove each element of their claims and where defendants are afforded the opportunity to raise all available defenses to those claims. These basic procedural protections provide a critical check on erroneous deprivations of property and apply equally to individual and class litigation.

A. This Court has consistently held, "from its first due process cases," that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). And where courts have departed from "traditional practice" and failed to "provide[ ] protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.*

From the common-law tradition that gives content and meaning to "due process," it is clear that the "fundamental requisite of due process of law is the opportunity to be heard.'" *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis* v. *Oredean*, 234 U.S. 385, 394 (1914)). Indeed, the Court has long recognized the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 798 (1996)). That a defendant

must be provided with "a day in court to make his defence" is a foundational tenet of the common law; it can be traced back as far as "chapter twenty-ninth of Magna Charta" and is embodied in the constitutional principle "that no man shall be deprived of his property without due process of law." *Rees* v. *City of Watertown*, 86 U.S. 107, 122 (1874).

As part of this right "to be heard," a defendant must be afforded an opportunity "to litigate the issues raised" by the plaintiff's claims, *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), including the "'opportunity to present *every* available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)) (emphasis added); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense.") (internal quotation marks omitted). Due process likewise "requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

B. The fundamental due process protections that emerge from this common-law tradition—including the rights to be heard, to litigate the issues raised, to present every available defense, and to examine adverse witnesses—cannot be eliminated simply because a case is certified as a class action. From its earliest class-action cases, the Court has emphasized that the procedural protections and standards of fairness that apply in traditional individualized

litigation apply with equal force in the class-action setting.

In assessing an early use of the class-action device, for example, the Court warned that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854). The Court later made clear that a class action is "a procedural right only, ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980), and that classwide adjudication therefore "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality op.).

In federal court, the constitutional rights of class-action defendants are safeguarded in substantial part by Federal Rule of Civil Procedure 23, which incorporates critical "procedural protections" that are "grounded in due process," *Taylor*, 553 U.S. at 901, and by the Rules Enabling Act, which prohibits class-action procedures from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b).

Although state courts are not obligated to follow Rule 23 or the Rules Enabling Act, *see Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011), this Court has repeatedly rejected state court class actions that failed to comport with the requirements of due process. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814–23 (1985) (holding that a nation-

wide class action violated due process because Kansas lacked a sufficient basis for applying its law to out-of-state claims); *Hansberry* v. *Lee*, 311 U.S. 32, 42–45 (1940) (holding that due process precludes binding absent class members to a class-action judgment unless they are "adequately represented by parties who are present"). The Constitution thus imposes certain procedural protections that must be obeyed in *all* class actions.

While several of this Court's decisions addressing the due process limitations on class actions have focused on the rights of absent class members, *see, e.g.*, *Hansberry*, 311 U.S. at 42–45, there is no doubt that abuse of the class-action procedure can also impair the due process rights of defendants. In fact, a number of lower courts have recently rejected class-action procedures that abridged the defendant's due process rights.

In *Carrera* v. *Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), for example, the Third Circuit held that a "defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Id.* at 307. The court explained that this "due process right" includes both the right "to challenge the elements of a plaintiff's claim" and the "right to challenge the proof used to demonstrate class membership." *Id.* Applying these due process principles, the Third Circuit vacated a class-certification order because the plaintiff failed to demonstrate that there was a "method for ascertaining class members" that was "reliable and adminis-

tratively feasible" and that permitted the "defendant to challenge the evidence used to prove class membership." *Id.* at 308.

Similarly, the Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), rejected on due process grounds a procedure in which "an initial estimate of the percentage of class members who were defrauded," along with an estimate of "the average loss for each plaintiff," would be used to determine the "total amount of damages suffered" by the class as a whole. *Id.* at 231. When "the mass aggregation of claims" is used "to mask the prevalence of individual issues," the court explained, "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232.

Several state courts have likewise condemned procedures that denied class-action defendants their due process rights. The California Supreme Court, for example, vacated a class-action judgment because the trial court's "decision to extrapolate classwide liability from a small sample, and its refusal to permit any inquiries or evidence" regarding class members "outside the sample group, deprived [the defendant] of the ability to litigate" its defenses in violation of due process. *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). Relying on this Court's decision in *Dukes*, the court emphasized that, under "principles of due process," a "'class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2561).

These decisions make clear that the bedrock procedural protections that emerged over centuries of common-law jurisprudence and that were incorporated into the Due Process Clause apply with full force to class actions. Thus, as in typical individualized litigation, a plaintiff cannot deprive a defendant of its property in a class action unless the plaintiff proves every element of his individual claims and the defendant is provided the opportunity to raise every available defense to those claims.

II. A "TRIAL BY FORMULA" IN WHICH INDIVIDUALIZED ISSUES ARE REPLACED BY EXTRAPOLATION, SAMPLING, AND AVERAGING VIOLATES DUE PROCESS.

A number of lower courts have lost sight of these basic due process principles in their zeal to facilitate class certification. While class actions have always represented a departure from the traditional model of bilateral adjudication, the threat that class actions pose to defendants' due process rights has become particularly acute in recent years, as courts have increasingly resorted to ever-more creative measures to facilitate the adjudication of ever-larger classes comprising inherently individualized claims.

A. "[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832 (1999). Before the 1966 amendments to Federal Rule of Civil Procedure 23, however, class actions were limited to relatively narrow circumstances. In fact, "*every* form of representative litigation" that had preclusive effect on absent class members before "the 1966 amendment to Rule 23 solely involved aggrega-

tion of claims that were already linked by substantive law prior to suit." Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 Emory L.J. 451, 456 (2014). And the predecessor to today's Rule 23(b)(3) damages class action, the "spurious" class action, only produced binding judgments as to those absent class members who affirmatively "opted-in" to the action. *See Amchem*, 521 U.S. at 615 (explaining that "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action, so characterized because it generally functioned as a permissive joinder ('opt-in') device"). As a result of these limitations, the class-action procedure was historically invoked with far less frequency—and in far less unorthodox settings—than it is today. *See, e.g.*, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 385–86 (1967) (noting "[d]espondency over the inadequacies" of the pre-1966 version of Rule 23, under which the "class-action device had become snarled").

The 1966 amendments to Rule 23 marked a sea change in the use of the class-action device. As this Court has explained, new Rule 23(b)(3)—which created the "opt-out" damages class—was "framed for situations 'in which class-action treatment is not as clearly called for'" as in traditional class-action settings. *Dukes*, 131 S. Ct. at 2558 (quoting *Amchem*, 521 U.S. at 614–15). In fact, "the drafters of the amendments to Rule 23 were quite clearly creating a procedural mechanism previously unheard of in Anglo-American law"—a procedural mechanism

that could "bind absent class members when their rights possessed no prelitigation substantive link" and who had not taken any action to join the litigation. Redish, *supra*, at 456.

B. In the aftermath of the 1966 amendments, this Court has repeatedly reiterated that the class action remains an "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" *Dukes*, 131 S. Ct. at 2550 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)), and that Rule 23 continues to "impose[ ] stringent requirements for certification that in practice exclude most claims," *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Nevertheless, "[i]n the decades since the 1966 revision of Rule 23, class-action practice has become ever more 'adventuresome,'" with courts increasingly invoking untested procedures to adjudicate claims *en masse* that were thought to be "too numerous to secure their 'just, speedy, and inexpensive determination' one by one." *Amchem*, 521 U.S. at 617–18 (quoting Fed. R. Civ. P 1); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 98 (2009) ("Since the emergence of the modern class action in the 1966 amendments to the Federal Rules of Civil Procedure, controversy has attended the certification of litigation to proceed on a class-wide basis.").

The perceived benefits of aggregation have led some lower federal courts—as well as state courts applying their own analogues to Rule 23(b)(3)—to certify classes that are far more sprawling, dispar-

ate, and internally conflicted than those contemplated by the drafters of Rule 23(b)(3) or authorized by this Court. To fit these highly individualized claims within the class-action mold, these courts have resorted to procedural shortcuts that relieve class members of their individual burdens of proof and restrict defendants' right to raise individualized defenses—in a sharp departure from the common-law procedures that are the "touchstone" of due process. *Oberg*, 512 U.S. at 430.

In *Dukes*, this Court recognized the serious shortcomings of class-action proceedings that replace individualized adjudication with extrapolation and sampling. 131 S. Ct. at 2561. The Ninth Circuit had attempted to transform a vast, unwieldly case—"one of the most expansive class actions ever"—into one that could "be manageably tried as a class action" by endorsing a trial plan under which "[a] sample set of the class members would be selected" and the "percentage of claims determined to be valid would then be applied to the entire remaining class without further individualized proceedings." *Id.* at 2547, 2550, 2561. This Court "disapprove[d]" that "novel project," which it labeled "Trial by Formula," and made clear that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561.

Despite the Court's clear repudiation of "Trial by Formula" in *Dukes*, some lower courts continue to permit plaintiffs to rely on extrapolation, sampling, and averaging to try their inherently individualized claims as class actions. Wal-Mart itself was

subjected to those deficient procedures in the *Braun* litigation, where only six plaintiffs testified on behalf of a class of 187,000 employees, the class-certification order and classwide judgment rested on extrapolation by the class's experts (rather than on individualized proof from class members), and the jury was not required to find that any of the class members had proved the individual elements of their wage-and-hour claims. *See* Pets. for Writ of Certiorari, *Braun*, Nos. 14-1123 & -1124; *see also, e.g.*, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1252, 1256–57 (10th Cir. 2014) (affirming class judgment of more than $1 billion where plaintiffs used "extrapolation to calculate damages"), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015).

The procedural irregularities were similarly egregious in this case. In fact, the trial proceedings endorsed by the district court—and upheld by the Eighth Circuit on appeal—were materially indistinguishable from the trial plan rejected in *Dukes*. Like the Wal-Mart associates in *Dukes*, the Tyson Foods employees swept into the class here held numerous different positions. Pet. 4. Those varied positions led, in turn, to significant differences in the types of protective clothing class members were required to wear and what they were required to wash, if anything (as well as differences in payment for those tasks). *Id.* at 4–5. Even though these distinctions had a dramatic impact on the time employees spent donning and doffing (and how much they were compensated), the jury was not asked to assess the actual time that any individual class member spent putting on, and removing, protective gear and whether that time was longer than the period for

which the employee was compensated. *Id.* at 11. Rather, plaintiffs were permitted to rely on an expert's calculation of an *average* donning-and-doffing time that was based on an erroneous assumption that all such time beyond K-Code time was uncompensated; that average was determined based on a nonrepresentative sampling of class members and then extrapolated to all of the remaining members of the class. *Id.* at 9–10.

Because plaintiffs were permitted to rely on this classwide, extrapolation-based procedure, individual class members were relieved of their burden of proving that they were undercompensated based on the time that they *actually* spent donning and doffing protective gear on unpaid time. Tyson Foods, in turn, was denied its right to raise individualized defenses to each plaintiff's claims and unfairly compelled to "defend against a fictional composite" plaintiff, rather than against the actual claims of each member of the class. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). These procedural shortcuts leave no doubt that the class-certification order is incompatible with the requirements of Rule 23 and the Rules Enabling Act. *See id.* (reversing class judgment and emphasizing that the fact a "shortcut was necessary in order for [the] suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible").

C. In addition to violating the federal procedural limitations on class actions, the class-certification order in this case culminated in a judgment that deprived Tyson Foods of its due process rights

because the procedural shortcuts used to force the plaintiffs' highly individualized claims into the class-action framework produced a proceeding that departed from the basic requirements of common-law adjudication.

The "Trial by Formula" endorsed by the Eighth Circuit used extrapolation, sampling, and averaging to relieve class members of their individual burdens of proof and to preclude Tyson Foods from raising defenses to their individual claims. If this wage-and-hour case had been a traditional suit initiated by a single plaintiff, it would have proceeded to trial in much the same way that cases have been tried for centuries: (1) the plaintiff would have testified about the actual time that she spent donning and doffing protective gear and washing based on her individualized job requirements and personal choices as well as the amount of time for which she was compensated, (2) Tyson Foods would have cross-examined the plaintiff to test the veracity of her testimony and would have called its own witnesses to dispute the plaintiff's assertions, and (3) the jury would have returned a verdict in which it determined whether the plaintiff had been undercompensated by Tyson Foods and, if so, the amount of damages to which the plaintiff was entitled.

None of that happened, however, because the plaintiffs' highly individualized claims were certified as a class action. To make classwide adjudication possible, the features of traditional common-law adjudication were abandoned: (1) the class introduced evidence about the average time that a sample of class members had spent donning and doffing and

washing, and assumed that all such tasks beyond Tyson Foods' K-Code payments were unpaid, rather than individualized evidence about each class member's actual experience, (2) Tyson Foods had no opportunity to cross-examine each class member to assess the validity of their individual claims and the sufficiency of their individual proof, and (3) the jury was not required to determine whether any individual class member had in fact been undercompensated by Tyson Foods or to assess the appropriate amount of damages for each undercompensated class member.

This radical departure from the traditional procedural safeguards of common-law adjudication violated Tyson Foods' due process rights because it produced a judgment in favor of plaintiffs who have never been required to prove the individual elements of their claims or to confront the defendant's individualized defenses to those claims. As even an academic who generally supports the use of extrapolation and sampling in class actions has acknowledged, these procedures "sacrific[e]" a defendant's "ability to contest its liability to each plaintiff" and deny the defendant its "right to a 'day in court'—an autonomy-enhancing ideal that is sometimes seen as the hallmark of American justice." Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459, 1471 (2015).

The due process rights of absent class members are also jeopardized by the use of "Trial by Formula." By divorcing the adjudication of absent class members' claims from individualized proof, extrapolation-based trial plans risk undercompensating

class members who nonetheless will be bound by the judgment. *See* Tidmarsh, *supra*, at 1470 ("[F]or the individual victims who receive the average award, the process almost always results in either over-compensation or under-compensation."). This case provides a stark illustration of this constitutional infirmity. Because the classwide damages award was not based on the individual circumstances of each class member, but instead on the "average" time that a subset of class members spent donning and doffing and washing, those class members who spent less than the "average" time on those tasks stand to receive unjustified windfalls, while those who spent more than the "average" time will lose forever their right to a full recovery. The possibility that absent class members bound by the judgment have been systematically undercompensated raises serious due process concerns. *See Shutts*, 472 U.S. at 807–08 ("due process protections apply to absent class members" where a class judgment "may extinguish the chose in action forever through res judicata").[2]

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[2] Class-action defendants have standing to challenge methodologies that undercompensate absent class members because systematic undercompensation can call into question the adequacy of representation and, in turn, the ability of a defendant to obtain a binding judgment against absent class members. *See Taylor*, 553 U.S. at 884 ("In a class action, . a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation."); *Shutts*, 472 U.S. at 804–05 (holding that a class-action defendant has standing to raise a challenge to a court's exercise of personal jurisdiction over absent class members because of the need to "assure itself of [the] binding effect of the judgment").

Because "Trial by Formula" fails to adjudicate the claims of individual class members, deprives defendants of their right to present defenses to those individual claims, and risks binding absent class members to judgments that result in pervasive undercompensation, it cannot be reconciled with fundamental principles of due process.

III. The Court Should Expressly Hold That "Trial By Formula" Violates Due Process.

This Court's rejection of "Trial by Formula" in *Dukes* plainly had due process underpinnings—particularly in light of the Court's concern that Wal-Mart had been denied the right to present "defenses to individual claims." 131 S. Ct. at 2561. Nevertheless, the Court did not explicitly address whether "Trial by Formula" violated due process and instead rested its express holding on the constraints of the Rules Enabling Act. *See id.* The lack of an unambiguous due process holding in *Dukes* has provided class counsel with a means of circumventing the decision in state courts—where the Rules Enabling Act does not apply—and provides a compelling reason to reject class certification in this case on both non-constitutional and due process grounds.

Wal-Mart's experience in *Braun* highlights that, in the wake of *Dukes*, state courts continue to endorse procedural shortcuts indistinguishable from the "Trial by Formula" rejected by this Court. *See also, e.g.*, *Moore* v. *Health Care Auth.*, 332 P.3d 461, 465–66 (Wash. 2014) (holding that due process does not require individualized proof of damages in class actions because such a requirement would "create an

unreasonable burden on class members" and "hinder state policy underlying class action lawsuits"). As a leading treatise on class actions has noted, "[d]espite [*Dukes*'] clear, due process-based directive against 'Trial by Formula,' a number of principally state courts have approved class proceedings that do not provide defendants an opportunity to introduce evidence going to individualized issues and defenses." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (11th ed. 2014). They have done so at the urging of plaintiffs' lawyers who have maintained that *Dukes* did not "place[ ] a constitutional due process limitation on the class action device." Kimberly A. Kralowec, Dukes *and Common Proof in California Class Actions*, Competition: J. Antitrust & Unfair Competition L. Sec. State B. Cal., Summer 2012, at 9, 12.

The disturbing frequency with which state courts continue to rely on procedural shortcuts such as sampling and extrapolation underscores that the "extent to which class treatment may constitutionally reduce the normal requirements of due process" remains an "important question" that the Court has yet to fully address. *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., Circuit Justice). Expressly deciding that important question in this case—and squarely rejecting, as a constitutional matter, the procedural shortcuts endorsed by the Eighth Circuit—would provide essential guidance to lower courts and put an end to the serial deprivation

of defendants' due process rights in class actions across the country.[3]

CONCLUSION

For the foregoing reasons, the Court should hold that "Trial by Formula" violates due process and reverse the judgment of the court of appeals.

Respectfully submitted.

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[3] In the event the Court declines to address in this case whether "Trial by Formula" is compatible with due process, it should grant one of Wal-Mart's pending petitions in *Braun* to resolve that critical constitutional question.

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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class includes hundreds of members who were not injured and have no legal right to any damages.

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II. CLASS CERTIFICATION IS IMPROPER WHEN THE CLAIMS OF SOME CLASS MEMBERS ARE IMPLAUSIBLE AND THUS THOSE MEMBERS LACK STANDING . . . 24

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to express its view that federal courts should certify cases neither as class actions under Rule 23 of the Federal Rules of Civil Procedure, nor as collective actions under the Fair Labor Standards Act, unless the plaintiffs can demonstrate that they have satisfied each of the requirements set forth in Rule 23 and the Fair Labor Standards Act. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF has also repeatedly urged the judiciary to confine itself to deciding only true "Cases" or "Controversies" under Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; blanket letters of consent have been lodged with the Court.

WLF is concerned that the decision below, by endorsing class certification based on estimates regarding the number of overtime hours a hypothetical "average" employee might have worked, deprives a defendant in a class or collective action of the right to litigate its statutory defenses to individual claims. Permitting class or collective claims to proceed in this manner is also unfair to those absent class members who worked more overtime hours than the "average" employee; under the appeals court's trial-by-formula approach, they may end up being undercompensated or even being classified as uninjured despite possessing evidence that they were not fully compensated for their overtime work.

WLF also supports this Court's edict that Fed.R.Civ.P. 23 must be interpreted in keeping with Article III constraints. The Eighth Circuit violated that edict when it upheld certification of a class that included hundreds of individuals whose claims for relief (under Respondents' own theory of the case) were wholly implausible and who thus lacked Article III standing

STATEMENT OF THE CASE

Respondents are current and former employees of Petitioner Tyson Foods, Inc. at Tyson's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and the nearly identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq.*, by failing to fully compensate them (*i.e.*, failing to pay time-and-a-half) for all hours worked in excess of 40 hours per week.

In calculating compensable working time for its Storm Lake employees, Tyson includes all hours when employees are at their work stations and the production line is moving ("gang time"). Tyson also pays employees for the time it estimates they require to perform other work-related duties, including the donning and doffing of personal protective equipment (PPE). Respondents' lawsuit contends that those estimates are too low, that many employees require more than the estimated time to complete their donning and doffing. Respondents contend that they are entitled to additional overtime pay whenever the extra required work is performed during a week in which an employee has already worked 40 hours.[2]

It is undisputed that the quantity of PPE worn at the Storm Lake facility varies considerably from worker to worker, and thus that the time required to don and doff PPE also varies considerably. Tyson has adopted several measures designed to ensure that employees are fully compensated for their donning and doffing time as well as the time spent walking to their work locations. In particular, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most class members to compensate for donning/doffing-related activities. Also, employees assigned to come in early to set up or to stay late to tear down remained "on the clock" during those assignments, and they had ample opportunity during

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[2] Storm Lake employees are paid well in excess of the minimum wage. Thus, Respondents do not claim that Tyson's alleged failure to compensate them for all work time constituted a violation of the minimum-wage provisions of the FLSA and the IWPCL.

that compensated time period to complete all donning, doffing, cleaning, and walking activities. Depending on their work assignments, some employees were able to don and doff PPE during "gang time," and thus the time they spent on those activities was already included in their compensated time. Some employees were required to clean equipment; others were not.

The considerable variation in time outside the regular work shift devoted by employees to donning and doffing would seem to preclude certification of a Rule 23(b)(3) class for Respondents' IWPCL claims (and of a collective action for their FLSA claims). Rule 23(b)(3) precludes certification unless "the questions of law or fact common to class members predominate over any questions affecting only individual members." The factual issues key to determining liability and damages—whether each employee spent more hours performing donning/doffing activity than the hours for which he was compensated and whether the employee worked more than 40 hours in any such week—would seem to require an individual-by-individual factual determination.

Respondents sought to avoid that problem by computing an average amount of time spent by each employee devoted to donning, doffing, and washing activity, based on a time study conducted by Dr. Kenneth Mericle. He observed a small sample of Tyson employees performing what he deemed to constitute donning, doffing, cleaning, and walking activity. Extrapolating that observation to all employees, he concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which he worked) on

donning/doffing/cleaning/walking activity.[3] Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to see which employees had worked overtime. Based on Dr. Mericle's conclusions regarding the "average" employee, Dr. Fox calculated what she believed was the additional overtime compensation owed by Tyson to each member of the class and, thus, to the class as a whole. Her study identified several hundred employees (and putative class members) who—even accepting that they spent Dr. Mericle's "average" number of minutes each work day performing compensable donning and activities—had been fully compensated by Tyson in compliance with the FLSA and the IWPCL.

In the district court, Tyson repeatedly voiced its objection to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to "trial by formula" and prevented it from litigating its defenses to individual claims. The district court nonetheless certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members. It also denied Tyson's repeated efforts to decertify. The jury found Tyson liable for failing to pay all required overtime for time spent on donning and doffing activity and awarded $2.9 million in damages to the class as a

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[3] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

whole. After trial, the district court denied Tyson's renewed objections to class certification and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a.

A divided Eighth Circuit panel affirmed. *Id.* at 1a-24a. The appeals court conceded that "individual plaintiffs varied in their donning and doffing routines." *Id.* at 8a. It nonetheless held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members had established Tyson's liability for underpayment of overtime wages, *id.* at 12a, with variations among class members existing only with respect to damages. *Id.* at 13a. Rejecting Tyson's assertion that Dr. Mericle's study was incapable of providing a class-wide answer to the liability and damages questions, the court said that "using statistics or samples in litigation is not necessarily trial by formula." *Id.* at 10a-11. It cited this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 546 U.S. 21 (1946), to support its conclusion that the jury could infer both class-wide liability and damages from the study. *Id.* at 11a-13a.

Nor did the Court deem it significant that Respondents' own expert, Dr. Fox, concluded that a significant percentage of the plaintiff class did not work overtime (even when Dr. Mericle's "average" donning, doffing, washing, and travel time were added to their time records) and thus could not establish liability or damages. *Id.* at 8a-9a. Rejecting Tyson's argument that Rule 23 precludes certification of a class

that includes concededly uninjured plaintiffs, the court said, "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." *Id.* at 9a (citation omitted).

Judge Beam dissented. *Id.* at 14a-24a. He concluded that the class- and collective-action certifications were improper because—in light of the wide disparity in work performed by class members—a class-wide proceeding lacked "the capacity to generate common answers apt to drive the resolution of the litigation." *Id.* at 23a (quoting *Wal-Mart*, 131 S. Ct. at 2251). He noted that, according to Respondents' own calculations, at least 212 class members could establish neither liability nor damages, and said that—given the jury's decision to award less than half the damages computed by Dr. Fox—it was likely that "more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* at 22a. The Eighth Circuit denied Tyson's petition for rehearing *en banc*; five judges voted to grant the petition. *Id.* at 114a.

SUMMARY OF ARGUMENT

The Eighth Circuit held that even when the claims of individuals are widely disparate, a trial court may manufacture a common issue of fact by assuming that each individual's claims are identical to a hypothetical "average" plaintiff, and then base certification of class or collective actions on the manufactured common issue of fact. That holding violates Rule 23(b)(3) and FLSA collective action requirements by permitting certification even when, as here, individual issues of fact and law overwhelm

common issues. It is unfair to defendants because it denies them the opportunity to defend against actual, individual claims rather than the claims hypothesized by the trial court. It is also often unfair to absent class members, many of whose claims will end up being compromised for the sake of obtaining class certification.

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Departure from that general rule is permissible only when the requirements of Rule 23 have been met—requirements designed to ensure that the rights of all parties are fully protected and that certification does not modify existing rights. Those requirements were not satisfied in this case because "the questions of law or fact common to class members" did not "predominate over any questions affecting only individual class members." Rule 23(b)(3).

By permitting this case to proceed as though (contrary to fact) the claims of all class members were identical to those of a hypothetical, "average" class member—thereby preventing Tyson from defending against the claims of individual class members—the Eighth Circuit violated the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The appeals court disregarded the terms of this Court's *Wal-Mart* decision, which expressly protected a class-action defendant's right to raise all defenses to the actual claims of individual plaintiffs.

Furthermore, the inferences that the appeals court sought to draw from Dr. Mericle's non-random observations of a small number of Tyson employees were unwarranted. When considered on an individualized basis, evidence that one employee took 20 minutes to perform a given task may sometimes support an inference that a second employee also took 20 minutes to perform the identical task when faced with identical working conditions. But this Court has never permitted *class-wide* factual issues to be determined on the basis of such inferences. Drawing inferences of this nature regarding the amount of time that every member of a class devoted to specified work activities is particularly inappropriate when, as the courts below readily conceded was true in this case, differing working conditions experienced by Tyson employees meant that their claims for additional overtime pay varied considerably from employee to employee.

The judgment should be reversed on the additional ground that the courts below could not properly exercise subject-matter jurisdiction over a certified class that included hundreds of individuals who lacked Article III standing. A federal court lacks jurisdiction over a claim when it is so insubstantial or implausible as not to involve a federal controversy. Respondents' own evidence establishes the utter implausibility of the claims of more than 200 class members. According to the expert reports on which Respondents rely as their basis for asserting the predominance of common issues of fact over individual issues, Tyson is not liable to those employees because company time records establish that they performed no uncompensated overtime work even if they are credited

with the "average" additional donning, doffing, and walking time computed by Dr. Mericle.

The identity of those 212 class members who lacked standing (because of the implausibility of their claims of injury) was readily ascertainable from Dr. Fox's expert report and thus could have been explicitly excised from the class without difficulty. The district court nonetheless ruled (over Tyson's objections) that a class including those 212 employees should be certified. Because Rule 23 may not be applied in a manner that impermissibly expands the judicial authority conferred by Article III of the Constitution, the judgment for the class must be reversed.

The Eighth Circuit asserted that inclusion of class members who lacked standing was irrelevant because the district judge instructed the jury that it should not award damages to "[a]ny employee who has already received full compensation for all activities." Pet. App. 10a. That assertion is doubly flawed. First, it does not excuse the unwarranted exercise of subject-matter jurisdiction over an improperly constituted class. Second, because the jury returned a general verdict that did not specify which members of the class established Tyson's liability, there is no way to determine whether the jury intended to award damages to the class members who lacked standing.

There is no constitutional basis for permitting the district court on remand to undertake its own allocation of the damages award. Moreover, permitting such an undertaking would be unfair not only to Tyson but also to absent class members. For example, class

members determined by Drs. Mericle and Fox not to be entitled to any compensation might well contend that they were, in fact, undercompensated because they devoted considerably more time to donning, doffing, and washing activities than did Dr. Mericle's hypothetical "average" employee. Once Respondents determined that they would seek class certification under a theory that precluded all possibility of recovery for 212 employees, it was incumbent on them to exclude those employees from the class in advance of trial—thereby permitting those employees, if they so desired, to seek relief on their own.

ARGUMENT

I. CLASS CERTIFICATION IS IMPROPER WHERE THE ONLY COMMON ISSUE TYING TOGETHER DISPARATE CLASS MEMBERS IS THE HYPOTHESIZED DESCRIPTION OF AN "AVERAGE" CLASS MEMBER

The Eighth Circuit certified a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations among the employees in terms of hours worked and working conditions. Indeed, the relevant issues identified by the Eighth Circuit as common to the class were not contested and thus did not need to be adjudicated by the district court.[4] The appeals court held that the

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[4] In an effort to distinguish *Wal-Mart*, the Eighth Circuit identified the following issues that supposedly tied the class together: "Unlike [*Wal-Mart*], Tyson had a specific company

paucity of significant common issues could be overlooked and a class certified on the basis of a counter-factual presumption: that every class member engaged in the same amount of donning, doffing, and walking as the "average" employee. Respondents were then permitted to demonstrate the amount of work performed by the "average" employee based on non-random observations of a small sample of employees. That holding cannot be squared with *Wal-Mart*. Tyson could not defend itself by demonstrating that it adequately compensated each of its employees—a defense guaranteed by Rule 23, *Wal-Mart* tells us, 131 S. Ct. at 2541—when the benchmark standard established by the district court was whether Tyson had adequately compensated a hypothetical "average" employee created by Dr. Mericle.

A. The Class-Wide Issue that Served as the Basis for Class Certification Focused on a Hypothetical "Average" Employee

To obtain class certification in a case seeking damages (as here), a plaintiff must demonstrate, *inter alia*, that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or

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policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike [*Wal-Mart*], class members worked at the same plant and used similar equipment." Pet. App. 8a. Those factual issues were uncontested by the parties. Indeed, uncontested issues such as whether putative class members all worked for one company were singled out in *Wal-Mart* as precisely the sort of issues that do *not* qualify as common issues for purposes of Rule 23(a)(2). *Wal-Mart*, 131 S. Ct. at 2551.

fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3). *Wal-Mart* made clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

The Court has described Rule 23(b)(3)'s predominance requirement as "even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. at 1432. It imposes on courts a "duty to take a close look at whether common questions predominate over individual ones." *Ibid.*

Individual issues abound in this case. All parties agree that the number of hours—outside of regular work shifts—devoted to donning, doffing, and washing by Storm Lake employees varied considerably from employee to employee. Moreover, whether such

work entitled a given employee to overtime compensation depended entirely on whether that employee otherwise worked 40 or more hours during the week in question. Furthermore, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most (but not all) class members to compensate for donning/doffing-related activities. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, what amount of damages are recoverable.

In contrast, the Eighth Circuit did not cite any issues of contested fact that are common to the class in the sense that their resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart*, 131 S. Ct. at 2551, and there are exceedingly few. Instead, the court presumed counter-factually that every employee performed the same amount of donning, doffing, and washing outside of regular work shifts, thus permitting the class trial to turn on whether Tyson had paid sufficient overtime wages to the hypothetical average employee.

The inevitable consequences of that presumption include: (1) some class members who devoted fewer hours to compensable donning, doffing, and washing than the hypothetical employee could prevail at trial despite never having worked more than 40 hours in any given week; and (2) some class members who devoted an above-average number of hours to compensable donning, doffing, and washing could be denied all recovery despite having worked more than 40 hours in a week. Even if it were accurate to

assert—and it is not—that the net result to Tyson is the same (*i.e.*, that the amount by which the class-wide judgment requires Tyson to overcompensate some class members roughly approximates the amount by which the judgment allows Tyson to undercompensate other class members), this Court has never permitted class actions to proceed on the theory that "it all comes out in the wash."

B. The Eighth Circuit's Class Certification Decision Cannot Be Squared With *Wal-Mart*

The effect of class certification in this case was to deprive Tyson of the ability to litigate its statutory defenses to individual claims. Once the district court held that Tyson's liability to the entire class turned on whether Tyson had paid sufficient overtime to the hypothetical average employee, it could no longer avoid liability by demonstrating that class counsel had failed to demonstrate that specific class members were inadequately compensated. As Tyson has explained, "In a class trial, . . . Tyson was reduced to attacking the methodology used by plaintiffs' experts to determine the 'average' donning/doffing time." Pet. at 23.

The Court explained in *Wal-Mart* that class certification under such circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. Under a trial plan approved by the Ninth Circuit in *Wal-Mart*, a master was to determine the liability and backpay claims of a small group of class members. The trial court would then extrapolate "the entire class recovery" (for a class of 1.5 million employees) from the

verdicts rendered in those initial proceedings. In other words, Wal-Mart would not be permitted to contest the remaining 1.5 million claims by asserting that it did not discriminate against the specific employees in question. *Id.* This Court held that Rule 23 class certification could not be employed in that manner. It stated, "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*

In an effort to distinguish *Wal-Mart*, the Eighth Circuit said, "Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a. That effort to distinguish *Wal-Mart* is unavailing because it is based on a false premise: Respondents do, in fact, seek to "prove liability only for a sample set of class members." Plaintiffs' claims rest entirely on Dr. Mericle's time study that purported to determine average donning and doffing time, and that study was based on a small, non-random sample of Tyson employees. Only by adding Dr. Mericle's average donning and doffing time to employee time records were plaintiffs in a position to assert that Tyson failed to pay employees all the overtime (*i.e.*, time-and-a-half) wages to which they were entitled.

A recent post-*Wal-Mart* appeals court decision illustrates the impropriety of class certification in overtime-wage cases where hours worked by the

"average" employee is alleged to be a common issue of fact. In *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the Seventh Circuit affirmed class decertification in a case brought by individuals claiming that their employer failed to pay them time-and-a-half for overtime work. The Court concluded that Rule 23(b)(3) did not permit class counsel to litigate the claims of 2,341 putative class members based on the testimony of 42 "representative" members of the class—in part because there was no evidence that the experiences of the 42 were representative of the class as a whole. *Id.* at 774.

Moreover, the Seventh Circuit held that class certification would be inappropriate *even if* their experiences were representative of the entire class because it is impermissible to award averaged damages to class members whose damages are not identical:

> To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity. And if the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) undercompensate him by half.

Id. As *Espenscheid* well illustrates, using Rule 23 in the manner approved by the Eighth Circuit violates the Rules Enabling Act because it enlarges the rights of some class members while reducing the rights of other class members.

C. *Mt. Clemens* Did Not Authorize Reliance on Sampling Evidence as a Basis for Class Certification

To support its contention that an inference of class-wide liability could properly be drawn from Dr. Mericle's non-random observations of a small subset of employees, the Eighth Circuit relied heavily on this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). According to the appeals court, *Mt. Clemens* authorized courts hearing wage-and-hour claims to draw all "reasonable inferences" regarding the work experience of all employees from the evidence of individual employees; it asserted, "For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated employees." Pet. App. 11a.

The Eighth Circuit misinterpreted *Mt. Clemens*. Nothing in that decision authorizes courts to infer that *all* class members devoted a specified number of minutes to uncompensated donning and doffing activity based on evidence that *some* employees performed such activity—particularly where, as here, the plaintiffs' own evidence demonstrates significant variation from employee to employee. At issue in *Mt. Clemens* was the *legal* issue of whether employees' donning, doffing, and walking time was compensable at all under the FLSA,

not (as here) the *factual* question of how much donning, doffing, and cleaning took place.

Mt. Clemens: Walking Time. The Court was not required to draw any class-wide factual inferences in order to determine that the time employees spent walking on the employer's premises (from the spot at which they entered the factory to their work stations) was compensable because it was *undisputed* that all employees were required to engage in at least several minutes of on-premises walking. The Court determined as a matter of law that "time necessarily spent by the employees in walking to work on the employer's premises" was compensable "working time" under the 1946 version of the FLSA. *Id.* at 691.[5]

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[5] The Court remanded the walking-time issue for a determination of the amount of compensation, if any, to which employees were entitled. *Id.* at 692. The Court cited evidence that most employees required only several minutes to reach their work stations, held that the FLSA does not require compensation for "de minimis" walking time, and concluded:

> The de minimis rule can doubtless be applied to *much of the walking time* involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

Ibid (emphasis added). The Court's use of the phrase "much of the walking time" is a clear indication that it expected the lower courts on remand to make employee-by-employee determinations regarding the amount of time devoted to a given activity, not to presume that all employees devoted the same amount of time to the activity as did a hypothetical "average" employee. If the Court had contemplated that the lower courts would presume a uniform

Mt. Clemens: Donning and Doffing Time. Similarly, the Court's discussion of FLSA compensation for donning and doffing time focused solely on issues of law, not disputed factual issues. In particular, the Court never addressed whether evidence introduced by several employees regarding *their own* experiences could be used to demonstrate that *other* employees also devoted time to donning and doffing. It simply directed the trier of fact on remand "to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.* at 693.

The issue before the Court was the legal sufficiency of the admittedly thin donning-and-doffing evidence presented by employees who testified at trial. The Court held—and all apparently agreed—that the sorts of "preliminary activities" in which the plaintiffs *alleged* they had engaged was compensable under the FLSA because "[t]here is nothing in such activity that partakes only of the personal convenience or needs of the employees." *Ibid.* The only disputed issue was whether the evidence submitted by the plaintiffs was sufficient to demonstrate that at least some employees had engaged in more than a de minimis amount of such activity.

The special master to whom the case was referred for trial concluded that the plaintiffs' evidence—which apparently did not include documentary evidence—was insufficient to demonstrate their claimed damages with the "degree of

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measure of time per activity for all employees, then the de minimis rule would have applied either to *all* walking time or to *none* of it.

reliability or accuracy" necessary to establish either liability or damages. *Ibid.* The Supreme Court disagreed, concluding that if employees could not recover damages in the absence of detailed evidence demonstrating the time they devoted to preliminary activities, employees would effectively "be barred from their statutory rights." *Ibid.*

Thus, the Eighth Circuit's contention that "testimony from eight employees established liability for 300 similarly situated workers" is a highly inaccurate description of the Court's holding in *Mt. Clemens*. The Court overturned a judgment in favor of the employer because the lower courts had imposed an overly stringent, "improper standard of proof" on the FLSA plaintiffs. *Id.* at 686. It also reversed because, it held as a matter of law, an employee is entitled to compensation for time (excepting de minimis amounts of time) that he is required to spend walking on his employer's premises before arriving at his work station. *Id.* at 691. *Mt. Clemens* did *not* hold that the plaintiffs' evidence was sufficient to "establish[ ] liability for 300 workers," or for *any* workers. To the contrary, the Court explicitly stated that the employer was entitled on remand to attempt to show the absence of any liability, on the theory that "the de minimis doctrine" precluded a determination that it had violated the FLSA. *Id.* at 694.

More importantly for purposes of this case, nothing in *Mt. Clemens* supports the Eighth Circuit's claim that courts may infer that all employees are entitled to damages under the FLSA based on evidence that other employees (or a hypothetical "average'

employee) are entitled to damages. *Mt. Clemens* said nothing more than that "it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time." *Id.* at 693. There is nothing "reasonable" about presuming that an absent class member worked a specified number of uncompensated overtime hours based solely on evidence that some other employees may have worked a similar number of uncompensated overtime hours.

When considered on an individualized basis, evidence that one employee took 20 minutes to perform a given task may sometimes support an inference that a second employee also took 20 minutes to perform the identical task when faced with identical working conditions. But before a court could determine that such an inference was reasonable, it would need to closely examine the facts involving the two employees to ensure that the working conditions really were identical. Accordingly, such inferences are never appropriate in the context of class actions, because the need to closely examine every employee's working conditions would run up against Rule 23(b)(3)'s predominance requirement. That is, individual issues of fact would overwhelm any common issues of fact.

The effort to draw such inferences in the class-action context reaches an absurd level when, as here, it is conceded that differing working conditions experienced by employees mean that the amount of time devoted to donning, doffing, and walking (as well as the amount of compensation already paid for such

activities) varies considerably from employee to employee. It is wholly unreasonable to infer that a Tyson employee whose working conditions differed markedly from most other employees nonetheless devoted an "average" number of hours to donning, doffing, and walking.

Both Respondents and the Eighth Circuit rely heavily on the fact that Tyson does not record the amount of time that each employee devotes to donning, doffing, and walking. *See, e.g.*, Pet. App. at 12a (noting that "Tyson has no evidence of the specific time each class member spent donning, doffing, and walking," and concluding that "when an employer has failed to keep proper records, courts should not hesitate to award damages based on the just and reasonable inference from the evidence presented."). That argument contains a kernel of plausibility with respect to *individual* claims. Assuming for the sake of argument that the FLSA really required Tyson to separately record the number of hours that its employees devoted to donning and doffing, *Mt. Clemens* may support an argument that any employee seeking to press an individual FLSA claim should not be subject to an overly stringent evidentiary burden.

On the other hand, the Court has never suggested that a reduced evidentiary burden should apply to the issue of whether a class should be certified. "[A] plaintiff seeking certification under Rule 23 bears the burden of proof with regard to all elements of" his claim. *Amgen v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1212 (2013). A class action "may only be certified if the trial court is

satisfied, after a *rigorous analysis*," that the prerequisites of Rule 23 have been satisfied. *Gen'l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added). Accordingly, Tyson's failure to maintain more detailed employee time records has no bearing on whether the trial court erred in certifying this case as a class and collective action. Indeed, there is no reason to conclude that more detailed time records would have strengthened Respondents' Rule 23(b)(3) argument that common issues of fact and law predominate over individual issues. We suspect, to the contrary, that more detailed records would only have highlighted the starkly different working conditions experienced by Tyson employees.

II. CLASS CERTIFICATION IS IMPROPER WHEN THE CLAIMS OF SOME CLASS MEMBERS ARE IMPLAUSIBLE AND THUS THOSE MEMBERS LACK STANDING

According to the damages model used by Respondents as their basis for class certification, the injury claims of 212 members of the plaintiff class are utterly insubstantial and implausible. It is well established that a plaintiff who fails to assert a plausible federal cause of action lacks Article III standing to invoke a federal court's jurisdiction. That requirement does not change in the class-action context.

The identity of these 212 class members was easily ascertainable from the wage calculations undertaken by Dr. Fox, and thus they could have been explicitly excluded from the class. The district court

nonetheless certified the class and repeatedly denied Tyson's objections that Rule 23 precludes certification of a class that contains absent class members who were not injured and thus lack standing. This Article III standing issue raises an independent basis for reversing the judgment below.

A litigant lacks Article III standing, and a federal court lacks subject-matter jurisdiction over the litigant's claim, whenever the claim is "so insubstantial, implausible, foreclosed by prior decisions of the Court or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). It is difficult to conceive of claims that are more insubstantial or implausible than claims for overtime compensation asserted by individuals who admittedly did not work overtime.

This Court has repeatedly stated that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)). Rule 23(a)(2)'s commonality requirement and Rule 23(b)(3)'s predominance requirement cannot reasonably be deemed satisfied when a certified class contains hundreds of members who lack Article III standing. Any other interpretation of Rule 23 is foreclosed, because a federal rule cannot authorize the federal courts to exercise powers that Article III of the Constitution prohibits them from exercising. As the

Court has explained:

> [F]ederal courts, in adopting rules, [are] not free to extend or restrict the jurisdiction conferred by a statute. Such a caveat applies *a fortiori* to any effort to extend by rule the judicial powers of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.

Willy v. Coastal Corp., 503 U.S. 131, 135 (1992).

Only one conclusion is possible: over Tyson's objections, this case went to trial with a certified plaintiff class that included more than 200 members over whom the district court lacked subject-matter jurisdiction. Plaintiffs generally need not, at the class certification stage, provide evidentiary support for the allegations contained in their complaint. *Amgen*, 133 S. Ct. at 1195. It is quite another matter, however, when the plaintiffs' own court filings affirmatively demonstrate that class members have not been injured. According to the experts put forward by Respondents to support class certification, the 212 class members in question never worked more than 40 hours in any week during the class period, even after adding Dr. Mericle's "average" donning and doffing time to their work records (as Dr. Fox did in connection with her expert report). Because (according to Dr. Fox's calculations) they never worked overtime, they do not have (and never had) a plausible basis for asserting Tyson's liability to them under either the FLSA or the IWPCL.

The Eighth Circuit asserted that inclusion of class members who did not claim injury (and thus lacked standing) was irrelevant because the district judge instructed the jury that it should not award damages to "[a]ny employee who has already received full compensation for all activities." Pet. App. 10a. But a jury instruction on damages does not excuse the unwarranted exercise of subject-matter jurisdiction over an improperly constituted class.

Moreover, there is no way to determine whether the jury based any of its award on the damages claims of the 212 class members who lacked standing. The jury found Tyson liable on the class claims and awarded the class $2.9 million in damages. That award was significantly less than one-half of the damages requested by Respondents. Given the jury's general verdict and the verdict's lack of a logical relationship to any specific claims asserted by the class, there is no way to determine how the jury intended its award to be distributed. The judgment must be reversed in full in light of the significant possibility that some portion of its award was intended to benefit class members who lacked Article III standing. *See Gasoline Prods. Co. v. Champlin Ref. Co*, 283 U.S. 494, 497 (1931) (Seventh Amendment prohibits setting aside only a portion of a jury verdict).

Indeed, any effort to reform the verdict would be unfair not only to Tyson but also to absent class members. For example, the 212 class members identified by Dr. Fox as not having worked overtime (and thus not entitled to compensation) may not agree with her assessment. Dr. Fox based her finding on a

counter-factual presumption: that all of the 212 employees devoted the precise number of hours to donning, doffing, and cleaning as did the "average" employee. She determined that none of the 212 employees were entitled to overtime compensation because their work hours remained below 40 hours per week even after the "average" donning, doffing, cleaning, and walking time was added to time listed in Tyson's records. If any of those employees have evidence that they devoted considerably more time to those activities than Dr. Mericle's "average" employee, they might well possess a valid claim for overtime. But if the class award is upheld, they likely would be precluded from filing such a claim.

Once Respondents determined that they would seek class certification under a theory that precluded all possibility of recovery for 212 employees, it was incumbent on them to exclude those employees from the class in advance of trial—thereby permitting those employees, if they so desired, to seek relief on their own.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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